93-592

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1993

THE DOW CHEMICAL COMPANY,

Petitioner

v.

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA, *et al.*,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What standards should a district court apply to determine the amount in controversy for purposes of subject matter jurisdiction in a removed action where the plaintiffs' pleadings do not claim a specific monetary amount?

2. Can claims advanced by commercial fishermen injured by water pollution be aggregated to reach the amount in controversy required for federal subject matter jurisdiction because they are derived from rights held in common by the public at large?

LIST OF PARTIES AND RULE 29.1 LIST

Petitioner before this Court and a defendant-appellee before the court of appeals is The Dow Chemical Company. Dow Quimica de Colombia, S.A., a subsidiary of The Dow Chemical Company, was also a defendant-appellee before the court of appeals. The non-wholly owned subsidiaries of The Dow Chemical Company are as follows:

Agri-Chem, Inc.
Agro Quimica Maringa S.A.
Agron Inc.
Aguas Industriales de Tarragona, S.A.
Airco Generon Systems LP
Alamo Land Company, Inc.
Anticorrosivos Industriales Limitada
Arabian Chemical Company Limited
Astropower, Inc.
Atlantic Power, Inc.
ASI Solar Energy Corporation
ASIPLA (Asociacion Gremial de Industriales del Plastico de Chile)
AVR Chemie B.V.
AVR Chemie CV
Badger Creek Limited
Bank Mendes Gans N.V.
Bear Mountain CoGen, Inc.
Bear Mountain Limited
Biochimica Del Salento S.p.A.
Bioresin Developments Ltd.
Blackhorse CoGen, Inc.
Blue Ridge Laboratories, Inc.
Borsele Hydrocracker B.V.
Brea Canyon CoGen, Inc
BCC CoGen, Inc.
Canada Pharmacal Co. (1975) Limited
Carderm Capital L.P.

Carderm Investments Inc.
Central Florida DGE, Inc.
Chalk Cliff CoGen, Inc.
Chalk Cliff Limited
Coalition Technologies, Ltd.
Collaborative Research, Inc.
Columbia Scientific Industries Corporation
Conklin IPP, Inc.
Corona Energy Corporation
Corona Energy Partners, Ltd.
CoGen Admin Services, Inc.
CoGen Kern Bluff, Inc.
CoGen Lime Rock, Inc.
CoGen Lynchburg, Inc.
CoGen Lyondell, Inc.
CoGen Poso Creek, Inc.
CoGen Power, Inc.
CoGen Power, L.P.
CoGen Terrace Bay, Inc.
Crestar Energy Canada Ltd.
Crestar Energy Inc.
Crestar Energy Marketing Corp.
Crestar Energy Marketing Ltd.
Crestar Hydrocarbons Ltd.
Crestar Oil and Gas Ltd.
Cromarty Petroleum Company Limited
CC CoGen, Inc.
CEC Prime, Inc.
CIA. Peruana De Telefonos S.A.
Destec — Sterling, Inc.
Destec Energy Canada, Inc.
Destec Energy, Inc.
Destec Engineering, Inc.
Destec Fuel Resources, Inc.
Destec Gas Services, Inc.
Destec Holdings, Inc.

Destec Miskolc, Inc.
Destec North American Ventures, Inc.
Destec Properties, Inc.
Destec Ventures, Inc.
Devonshire Underwriters Limited
Dexco-Polymers
Dionex Corporation
Dolco Packaging Corp.
Dong Yang Elanco Co., Ltd.
Double "C" CoGen, Inc.
Double "C" Limited
Dow Chemical Iberica S.A.
Dow Chemical Japan Limited
Dow Corning (Korea) Ltd.
Dow Corning (Thailand) Ltd.
Dow Corning (UK) Management Ltd.
Dow Corning de Argentina S.A.I.C.
Dow Corning de Colombia, S.A. (Siliconas de Colombia Limitada)
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning de Brasil Ltda.
Dow Corning Australia Pty. Ltd.
Dow Corning Canada, Inc.
Dow Corning Construction S.A.
Dow Corning Coordination Center S.A.
Dow Corning Corporation
Dow Corning Enterprises, Inc.
Dow Corning Foreign Sales Corporation, Inc.
Dow Corning Foundation
Dow Corning France S.A.
Dow Corning GmbH
Dow Corning GmbH (Austria)
Dow Corning Hansil Limited
Dow Corning Hong Kong Limited
Dow Corning Iberica S.A.

Dow Corning International Sales Corporation
Dow Corning Investment S.A.
Dow Corning Japan Ltd.
Dow Corning Korea, Inc.
Dow Corning KK
Dow Corning Limited
Dow Corning New Zealand Ltd.
Dow Corning Puerto, Inc.
Dow Corning S.p.A.
Dow Corning B.A.
Dow Corning Silicon Energy Systems, Inc.
Dow Corning STI Limited
Dow Corning STI, Inc.
Dow Corning Taiwan, Inc.
Dow Corning Toray Silicone Co., Ltd.
Dow Corning Wright Corporation
Dow Kakah Kabushiki Kaisha
Dow Mitsubishi Kasei Limited
Dow Services Singapore Pte Ltd.
Dow-United Technologies Composite Products, Inc.
DowBrands L.P.
DowElanco
DowElanco (Malaysia) Sdn Bhd
DowElanco (NZ) Limited
DowElanco (Thailand) Limited
DowElanco de Colombia S.A.
DowElanco Argentina S.A.
DowElanco Australia Limited
DowElanco B.V.
DowElanco Canada Inc.
DowElanco Chile S.A.
DowElanco China Ltd.
DowElanco Danmark A/S
DowElanco Export S.A.
DowElanco GmbH
DowElanco Iberica S.A.

DowElanco Industrial Ltda.
DowElanco International Ltd.
DowElanco Italia S.p.L.
DowElanco Limited
DowElanco Mexicana, S. A. de C. V.
DowElanco Pacific Limited
DowElanco Pflanzenschutzmittel Vertriebsg, m.b.H.
DowElanco S.A.
DowElanco Sverige AB
DowElanco Taiwan Ltd.
DowElanco Tarim A.S.
DowElanco Venezuela, C.A.
Dynopharm GmbH Pharmaceutica
DC Krafft S.A.
DC Liquid System Technologies, Inc.
DC STI S.A.
DCS Capital Corporation
DCS Capital Partnership
DCU/LB Trust
DH Compounding Company
El Dorado Terminals Company
Elanco Ihara K.K.
Epoxital S.R.L.
Estireno del Zulia, C.A.
Etoxilados del Plato S.A.
Eurosemences, S.A.
Expandite Essex Pty. Limited
Expansao Corretora de Seguros Ltda. S/C
EDN — Estireno do Nordeste S.A.
Flura Corporation
Fort Saskatchewan Ethylene Storage Corporation
Fort Saskatchewan Ethylene Storage Limited Partnership
Fuji Polymer Industries Co., Ltd.
Gas Services Holdings Limited
Gasification Services, Inc.
Generon Systems

Generon Systems A.B.
Genetics Institute Inc. (GENI)
Gention de Capital Riesgo del Pais Vasco S.A.
Granite Road Limited
Gruppo Lepetit S.p.A.
Gruppo Lepetit Trading Srl
Gurit-Essex AG
GENSIA PHARMACEUTICALS, INC.
GIE Euromais
H-D Tech Inc.
Hammer Pharma S.P.A.
Harriman Energy Partners, Ltd.
Hemlock Semiconductor Corp.
Henning Berlin Anlagen GmbH
Henning Berlin Biochemie GmbH
Henning Berlin GmbH
Henning Berlin GmbH, Wien
High Sierra Limited
Houston Power Partners, Inc.
HD Polyurethane Company
HEP CoGen, Inc.
Ibachem (Ibafon Chemicals) Limited
Indaver, N.V.
Indian Hills Development Corp. of Carroll County
ICAP — Industria Chemica S.R.L.
IGENE Biotechnology, Inc.
J.C.P. Laboratories Inc.
Joliet Marine Terminal Trust Estate
Kern Bluff Limited
Kern Front CoGen, Inc.
Kern Front Investment, L.P.
Kern Front Limited
Kingston Power Partners, Inc.
Kinu Ura Coastal Railway
Kukje Pharmaceutical Industrial Company Ltd.
Laboratories Pharmaceutiques Biotic Maroc S.A.R.L.

Lakeside Laboratories, Inc.
Lawrence CoGen, Inc.
License Royalty Corporation
Lime Rock Energy, Inc.
Lime Rock Limited Partnership
Live Oak CoGen, Inc.
Live Oak Limited
Louisiana Gasification Technology, Inc.
Lucky Epoxy Limited
Lucky-DC Silicone Co., Ltd.
Maasvlakte Oil Terminal C.V.
Maasvlakte Oil Terminal N.V.
Magma Power Company
Maligne Resources Limited
Marion & Company
Marion Merrell Dow (Canada) Inc.
Marion Merrell Dow (Europe) A.G.
Marion Merrell Dow (NZ) Limited
Marion Merrell Dow et Cie (SNC)
Marion Merrell Dow Australia Pty. Limited
Marion Merrell Dow Consumer Products Inc.
Marion Merrell Dow GmbH
Marion Merrell Dow Inc.
Marion Merrell Dow K.K.
Marion Merrell Dow Limited
Marion Merrell Dow N.V./S.A.
Marion Merrell Dow Puerto Rico, Inc.
Marion Merrell Dow S.A.
Marion Merrell Dow S.A.
Marion Merrell Dow Sociedade Quimica, S.A.
Marisub FSC, Inc.
Marisub V, Inc.
Marisub, Inc.
McKittrick Limited
Medical Implements, Inc.
Merrill Dow Pharmaceuticals (Canada) Inc.

Merrill Dow Pharmaceuticals Inc.
Merrill Dow Pharmaceuticals International Inc.
Merrill Dow Pharmaceuticals Pacific Limited
Millpower CoGen, Inc.
Mont Blanc CoGen, Inc.
Montedison SpA
Mortell de Mexico SA de C.V.
N.V. Dow Corning S.A.
Neoprobe Corporation
Niedersachsische Gesellschaft zur Endablagerung von Sonderabfall mbH
Nordhafen-Verwaltungsgellschaft mbH
Nordic Laboratories Inc.
Nordic Merrell Dow Research Inc.
Northway CoGen Inc.
NBW Industria E. Commercio Limitada
NKY Distribution Center Inc.
NPC Services, Inc.
NPRC Management Corporation
Oasis Pipeline Company
Oyster Creek CoGen, Inc.
Oyster Creek Limited
OCG CoGen, Inc.
P.T. Pacific Chemicals Indonesia
P.T. Pacific Indomas Plastic Indonesia
Pacific Plastics (Thailand) Limited
Palm Beach CoGen, Inc.
Partners Oil Company
Petroquimica-Dow S.A. (Petrodow)
Pilgrim Power, Inc.
Polk County CoGen, Inc.
Polykem S.A.
Polylactane Incorporated
Puso Creek Limited
Promix System
Prosperity IPP, Inc.

Prosperity Limited Partnership
PRO-PE GmbH Rucknahme und Verwertung von Verpackungen
PSE-CC Investment, L.P.
PSE-HS Investment, L.P.
Recon Associates, Inc.
Rio Grande CoGen, Inc.
RIGK — (Gesellschaft zur Ruckfuhrung industrieller und gewerblicher Kunststoffverpackunge mbH)
S.A. Interentreprise Les Bouillides
Safechem Umwelt Service GmbH
San Joaquin CoGen Limited
San Joaquin CoGen, Inc.
Shape Inc.
Siam Polystyrene Company Limited
Siam Styrene Monomer Co., Ltd.
Siam Synthetic Latex Company Limited
Sierra CoGen, Inc.
Silcover SpA
Siliconas de Chile Limitada
Siliconas Del Peru S.A.
Silinor S.A.
Siltech Limited
Site Services, Inc.
Store Heat and Produce Energy, Inc.
Suministradora de Productos Quimicos, S.A.
Sumitomo Dow Limited
SD Group Service Co., Ltd.
SDC Coatings, Inc.
SJC CoGen, Inc.
SJC/CNGE Chalk Cliff Investors, Ltd.
SJC/CNGE San Joaquin Investors, Ltd.
Tanabe-Marion Laboratories
The Cynara Company
The Edgar Lomax Company
Thixomat, Inc.

Tiger Investors Limited Partnership
Transformadora de Etileno A.I.E.
TOTAL Opslag en Pijpleiding Nederland N.V.
TOTAL Raffinaderij Nederland N.V.
Ulsan Pacific Chemical Corporation
United AgriSeeds, Inc.
Univar Corporation
Verneuil Holding SA
Vinpol S.A.
VGK — Verwertungsgesellschaft fur gebrauchte Kunststoffverpackungen mbH
Wabiskaw Explorations Ltd.
Warsaw Transmission, Inc.
Weissberg CoGen, Inc.
Wickhen Products of Delaware, Inc.
Wickhen Products, Inc.
WR Coal Gasification, Inc.
Zhejiang Pacific Chemical Corporation
Zoo-Agro de Venezuela, C.A.
2788632 Canada Ltd.
3 R Associati S.p.A.

The Respondents before this Court and plaintiffs-appellants before the court of appeals are Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia ("ANPAC"), an association of Colombian fishermen allegedly prosecuting this action on behalf of its individual members, and several hundred individual fishermen who are listed in Plaintiffs' Original Petition. (Appendix at 27a - 33a).

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Dow Chemical Company prays that a Writ of Certiorari issue to review the opinion and order of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 15, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit, entered on April 15, 1993, is reported at 988 F.2d 559, and is reprinted in the Appendix to this petition at 1a - 19a. The order of the Fifth Circuit denying The

Dow Chemical Company's petition for rehearing and suggestion for rehearing en banc, issued on September 8, 1993, is reprinted in the Appendix at 20a - 21a. By its order issued on September 23, 1993, the Fifth Circuit stayed the issuance of the mandate through October 15, 1993. (Appendix at 22a - 23a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendition of judgment. The decision for which review is sought was rendered on April 15, 1993. A petition for rehearing was timely filed, and rehearing was denied on September 8, 1993.

STATUTORY PROVISIONS INVOLVED

This petition involves the jurisdictional amount provisions of 28 U.S.C. Section 1332, which sets the standards for diversity of citizenship jurisdiction in federal district court. This statute is reprinted in the Appendix at 25a - 26a.

STATEMENT OF THE CASE

According to plaintiffs, this is a "major personal injury and economic damage case." (Appendix at 34a). Plaintiffs, a Colombian association and several hundred individual fishermen, originally sued Dow Quimica de Colombia, S.A. ("Dow Quimica"), a Colombian corporation, and The Dow Chemical Company ("Dow Chemical") in Texas state court. They sought damages for a pesticide spill which occurred when a storage tank failed at Dow Quimica's Mamonal manufacturing facility in the Republic of Colombia. (Appendix at 36a, 38a - 41a). Allegedly, the pesticide flowed into the Bay of Cartagena and killed "untold millions" of fish and other fauna in "catastrophic numbers." (Appendix at 37a).

In their pleadings, plaintiffs alleged that they suffered personal injuries and "grave economic losses from the inability to fish and from greatly diminished harvests." *Id.* They claimed that these economic losses caused "severe hardship, poverty, hunger and deprivation to themselves and their families. *Id.* Although the spill occurred in June, 1989, plaintiffs claimed that the spilled pesticide would "remain in the Bay" and that fish would "continue to die" from the spill. *Id.* Thus, according to plaintiffs' allegations, their economic interests were permanently compromised. Although plaintiffs' pleadings did not specify an amount of damages, they alleged that their losses "far exceed[ed] the minimum jurisdictional limits" of the court. (Appendix at 34a).

Based upon these allegations, Dow Chemical removed the action to federal court. In its notice of removal, Dow Chemical asserted that its co-defendant, Dow Quimica, an alien corporation, was fraudulently joined to defeat diversity jurisdiction. (Appendix at 43a - 47a). The notice alleged that Dow Quimica was "fraudulently joined" because it was not subject to personal jurisdiction in Texas. *Id.* In view of this fraudulent joinder, true diversity of citizenship existed between the remaining parties.

Dow Chemical's notice of removal also asserted that the amount in controversy exceeded $50,000. (Appendix at 44a). Other than plaintiffs' pleadings, no other basis for determining the "amount in controversy" existed at the time of removal. In their motion to remand, plaintiffs, for the first time, asserted in affidavits and stipulations that no individual fisherman had suffered damages exceeding $50,000. (Appendix at 52a, 55a). Such a limitation was not apparent at the time of removal. Indeed, a reasonable interpretation of plaintiffs' pleadings suggests that plaintiffs were seeking at least $50,000 for each individual party.

Simultaneously with the notice of removal, Dow Quimica filed a motion to dismiss for lack of personal jurisdiction. At the same time, Dow Chemical moved to dismiss for *forum non conveniens.* Notwithstanding these motions, plaintiffs did not pursue any

discovery against either defendant and did not file any papers opposing their motions. Instead, plaintiffs merely filed a motion to remand. The motion to remand asserted that the district court lacked subject matter jurisdiction because plaintiffs' claims failed to meet the jurisdictional "amount in controversy," and that defendants had failed to "meet their burden" to establish fraudulent joinder.

Although defendants filed an unopposed motion to defer plenary discovery until the pending motions were resolved, the district court did not rule on the motion before the April 15, 1991 motions hearing. (Appendix at 24a). Even if the motion had been granted, however, it clearly envisioned that discovery into the threshold issues of personal jurisdiction and *forum non conveniens* would not be deferred. Accordingly, while the motion to remand was pending, Dow Quimica filed requests for admissions, interrogatories and requests for production. Defendants presented plaintiffs' answers to this discovery to the district court before the motions hearing. These answers conclusively established that Dow Quimica was not subject to personal jurisdiction in Texas. The answers also conclusively established that Dow Chemical was entitled to dismissal for *forum non conveniens*. In view of this record, the district court overruled plaintiffs' motion to remand and granted defendants' motions to dismiss. (Appendix at 24a). Thereafter, plaintiffs filed an appeal with the Fifth Circuit.

A panel of the court of appeals, composed of Judges Garwood, Garza, and Duhe, affirmed the dismissal of Dow Quimica, but reversed and remanded the *forum non conveniens* dismissal of Dow Chemical. This opinion is reported at 988 F.2d 559 and is reprinted in the Appendix to this Petition for Certiorari at 1a - 19a.

Generally, the panel concluded that Dow Chemical had failed to demonstrate that the amount in controversy exceeded the $50,000 sum required for adjudication in federal court. Although Dow Chemical argued that, on the face of the pleadings, the

plaintiffs' allegations, if proved, could reasonably support individual awards exceeding $50,000, the panel held that the allegations were "clarified" by the post-removal affidavits made by plaintiffs' counsel. The panel failed to consider Dow Chemical's argument that the affidavits were legally defective. The panel also rejected Dow Chemical's contention that the fishermen's claims could be aggregated. In so ruling, the panel held that the claims were not "derivative" from damage to a common resource and opportunity, but rather separate claims for damages to each fisherman's livelihood. Upon receipt and review of the panel's opinion, a motion for rehearing was filed. A suggestion for rehearing en banc was also filed. Both the motion for rehearing and suggestion for rehearing en banc were subsequently denied by the court of appeals. (Appendix at 20a - 21a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE COURT OF APPEALS ERRED BY CONCLUDING THAT THE RECORD ESTABLISHED THAT THE AMOUNT IN CONTROVERSY FOR EACH FISHERMAN WAS LESS THAN THE $50,000 JURISDICTIONAL AMOUNT

This petition seeks review of one of the most troubling and ambiguous areas of federal law, namely, the standards for determining the amount in controversy in a removed action where the plaintiffs have failed to allege a specific amount of damages. If the Fifth Court's opinion is correct, a defendant's right to remove depends not upon an objective interpretation of the complaint, but rather upon the subjective and undisclosed intentions of plaintiffs' counsel. If the defendant fails to remove within the statutory period because the amount in controversy is undisclosed and cannot be precisely determined from the complaint, the defendant may waive its rights. If, on the other hand, the defendant removes immediately because the facts alleged in the complaint objec-

tively suggest an acceptable amount in controversy, the removal can be defeated by a simple affidavit or stipulation which unilaterally disclaims plaintiffs' intent to seek damages sufficient to invoke federal jurisdiction. Although these results are clearly unjust, they will inevitably recur throughout the nation unless this Court intervenes to set clear standards in this action.

As the court of appeals's decision states, the issue of a removing defendant's burden regarding the jurisdictional amount in controversy "is a question on which courts have disagreed and for which there is no clear answer in this Circuit." 988 F.2d at 564 (Appendix at 12a). As the court of appeals recognized, the controlling authority on this point is *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938). In *St. Paul Mercury,* the Supreme Court held that a case may be removed unless it "appears to a legal certainty that the claim is really for less than the jurisdictional amount." 303 U.S. at 289. The question, therefore, is whether the record demonstrates that, at the time of removal, it was "legally certain" that plaintiffs were seeking less than $50,000 for each of their claims.

In concluding that the record failed to demonstrate that the amount in controversy requirement was met, the court of appeals made three findings, each of which was indispensable to its decision to reverse Dow Chemical's dismissal:

> (A) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or recovered were likely above $50,000;
>
> (B) the defendants offered only a conclusory statement in their notice of removal that was not based upon direct knowledge about the plaintiffs' claims; and
>
> (C) *the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.*

988 F.2d at 566 (Appendix at 15a - 16a) (emphasis added). Without the affidavits referred to in Section (C) above, the court of appeals recognized that the record was "ambiguous" and that it could not say "that the claims are necessarily outside of the range that could confer federal jurisdiction." 988 F.2d at 565 (Appendix at 13a). Since the affidavits were a linchpin of the court of appeals's decision, the panel's holding necessarily depends on their legal sufficiency.[1]

---

[1] Notwithstanding this critical point, the court of appeals failed to consider defendants' arguments that the affidavits were legally defective. Defendants filed objections in the district court which asserted that the affidavits were not based upon personal knowledge, relied upon improperly authenticated documents, and were based upon surmise and speculation. (Appendix at 58a - 60a). For example, the declaration of German Sarmiento Palacio merely stated that he was plaintiffs' "Colombian attorney" and that he resided in Bogota. (Appendix at 51a). Mr. Palacio did not state that he had personal knowledge of any of the facts in the declaration and provided no information regarding how he obtained the information he recites. Specifically, Mr. Palacio did not describe how he learned that "no individual fisherman suffered a loss greater than fifty thousand U.S. dollars." (Appendix at 52a). Certainly, the mere recitation that "annual wages in Colombia are lower than in the United States" is not sufficient to support such a conclusory statement. *Id.* Mr. Clem's affidavit suffered from similar flaws. (Appendix at 55a - 57a).

If the court of appeals had considered Dow Chemical's objections, it would have concluded that the affidavits could not be considered. To be admissible, affidavits must be made on personal knowledge, must set forth facts which would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. *See Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 194 (5th Cir. 1988). As the Seventh Circuit recently stated,

> [Statements in an affidavit] must be grounded in observation or other first hand experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.

Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 659 (7th Cir. 1991). *See also Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) ("[A] hearsay affidavit is not a substitute for the personal knowledge of a party.") *See Landscape Design & Construction Company, Inc. v. Warren*, 566 S.W.2d 66 (Tex. Civ. App. 1978). This is especially true when the affidavit is not filed by a party, but rather by the party's attorney.

Without the affidavits, the court of appeals could not say that the fishermen's claims are "*necessarily* outside the range that could confer federal jurisdiction." 988 F.2d at 565 (Appendix at 13a) (emphasis in original). Hence, the record does not show that it is "legally certain" that plaintiffs cannot recover individual awards of $50,000. At best, the record shows that plaintiffs' counsel unsuccessfully attempted to make a post-removal stipulation regarding his clients' claims. Unaccepted stipulations are not evidence. *See James v. Wallace,* 533 F.2d 963, 967 at n. 7 (5th Cir. 1976) ("[S]tipulations are effective only when they are the product of mutual assent.") Moreover, allowing such a stipulation conflicts with the Supreme Court's holding in *St. Paul Mercury,* which expressly prohibits post-removal stipulations which are intended to defeat federal jurisdiction. *See St. Paul Mercury,* 303 U.S. at 293.

Since the affidavits of plaintiffs' counsel could not be considered, this Court must decide whether "ambiguous" allegations which do not "necessarily fall outside the range that could confer federal jurisdiction," are sufficient to sustain a removal. 988 F.2d at 565 (Appendix at 13a). The decision must be made from two documents: plaintiffs' pleading and defendants' notice of removal.

In *Kliebert v. Upjohn Co.,* 915 F.2d 142 (5th Cir. 1990), *reh'g en banc granted,* 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement,* 947 F.2d 736 (5th Cir. 1991), the court of appeals divided on a similar question. In that case, the removing defendant argued that the *St. Paul Mercury* rule only required a showing that it was <u>not</u> "legally certain" that the plaintiffs would necessarily recover less than the jurisdictional amount. The defendant argued that, even though the plaintiffs specified an amount of damages in the complaint, state law did not preclude them from recovering a larger amount. The majority rejected this argument and held that the defendants' proposed standard placed "too light a burden" on the removing defendant. According to the majority, plaintiffs' allegations regarding a

specific amount in controversy were entitled to "greater deference." 915 F.2d at 146.

In his dissent, Judge Jolly stressed the unfairness of the majority's decision, which applied different standards to removing defendants than to plaintiffs who filed originally in federal court. According to Judge Jolly, a plaintiff's claim should satisfy the jurisdictional amount under the same standard of review "irrespective of which party asserts jurisdiction." *Id.* at 147. Continuing, he emphasized that, pursuant to *St. Paul Mercury*, the amount in controversy should be determined from the "face of plaintiff's pleading" unless and until challenged as having been asserted in "bad faith." At that point, "if the injury claimed will reasonably support damage in an amount required by the statute, the federal jurisdiction exists." *Id.* at 148.

Although *Kliebert* involved a case where the plaintiff actually alleged a specific amount of damages, Judge Jolly's remarks are nevertheless instructive. In the present case, the plaintiffs' allegations, if proved, could "reasonably support" individual awards exceeding $50,000. Plaintiffs have not alleged mere temporary losses. Rather, they have alleged that their livelihoods and their families will be *permanently* affected by the spill. According to the plaintiffs:

> (A) "This gross disruption of the food chain has had, *and will continue to have,* the effect of limiting commercial fish harvests in the area" because "fauna in the Bay have been killed in catastrophic numbers." (Appendix at 37a).
>
> (B) The spilled pesticide *"will remain in the Bay"* and the fish, fingerlings and food chain *"will continue to die from this pollution."* *Id.*

These allegations belie the court of appeals's conclusory remarks that "the injuries alleged in the plaintiffs' complaint are not ones that are facially likely to be over the jurisdictional amount." 988 F.2d at 565 (Appendix at 13a). Moreover, despite the court of

appeals's suggestion, the complaint does not limit the plaintiffs' personal injuries to "skin rashes." *Id.* Rather, the complaint broadly alleges a wide range of unspecified injuries, thus permitting the plaintiffs to argue any type of injury to the jury. (Appendix at 34a - 41a). Such injuries could include neurological damage, carcinogenicity, and other aggravating conditions which are often claimed in pesticide exposure cases. These allegations provide evidence that, under Judge Jolly's test in *Kliebert*, the "range of awards embraces the jurisdictional amount." 915 F.2d at 149.

Under these circumstances, Dow Chemical urges the Court to recognize and apply a uniform test when determining the amount of controversy in cases removed from state court. Such a test should be consistent with the Court's traditional policy which provides that standards for determining jurisdictional amounts should favor "those parties seeking to invoke the jurisdiction of a federal court." *Opelika Nursing Home v. Richardson*, 448 F.2d 658, 663 (5th Cir. 1971) (emphasis added). Accordingly, any new standard should equally respect both a plaintiff's right to sue in federal court originally and a defendant's statutory right to remove an action to a federal forum. Under this reasoning, a defendant's good faith allegation of damages in their petition for removal is entitled to the same weight as one made in a plaintiff's complaint filed originally in federal court. *See Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890 (1961)("No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules.") As Justice Jolly stated in *Kliebert*, "[t]here is no reason to value the plaintiff's right to select a state court forum as a more worthy consideration than the nonresident defendant's statutory right to seek an impartial tribunal." *Kliebert*, 915 F.2d at 148.

In actions where, as here, the plaintiffs' complaint does not state a specific amount of damages, the district court should

determine whether, at the time of removal, the defendant's allegation in its notice of removal that the amount in controversy exceeded $50,000 was made in "bad faith." In line with *St. Paul Mercury*, a claim of jurisdiction is asserted in "bad faith" if it appears "to a legal certainty" from the face of the complaint that the plaintiff cannot recover the minimum jurisdictional amount. *St. Paul Mercury*, 303 U.S. at 289-90. By concluding that defendants' removal was "not frivolous" and that the removal had "arguable merit," the court of appeals necessarily found that defendants' allegation that the amount in controversy exceeded $50,000 was not made in "bad faith." 988 F.2d at 566 (Appendix at 16a).

Moreover, by allowing plaintiffs to disclaim the jurisdictional amount after removal through an unaccepted stipulation, the court of appeals violated the proscription of *St. Paul Mercury*, which precludes plaintiffs from altering or minimizing the effect of the allegations upon which the removal was based. *St. Paul Mercury*, 303 U.S. at 292. Where, as here, the face of the complaint justifies a conclusion that plaintiffs could reasonably recover damages exceeding the jurisdictional amount, the Court should not permit unsubstantiated post-removal disclaimers. Unless supported by independent, objective and admissible proof, post-removal disclaimers should be viewed skeptically. As Judge Jolly recognized in *Kliebert*, "a lawyer has at least a prima facie duty to seek the highest judgment for his client that the injury suffered will reasonably support." *Kliebert*, 915 F.2d at 148. Counsel who tout their lawsuit before removal as a "major personal injury and economic damage case" (Appendix at 34a) which involves enduring "catastrophic" (Appendix at 37a) damages should not be allowed to disavow the natural inferences from those allegations merely because they are removed to federal court. Counsel who do so raise the reasonable suspicion that they are limiting their clients' recoveries merely to avoid a federal forum — a tactic which should justifiably elevate judicial eyebrows. Accordingly, Dow Chemical urges the Court to recognize

that the court of appeals erred in concluding that the record did not establish the requisite jurisdictional amount for the individual plaintiff's claims.

II.

THE COURT OF APPEALS ERRED BY CONCLUDING THAT THE FISHERMEN'S CLAIMS COULD NOT BE AGGREGATED TO REACH THE $50,000 JURISDICTIONAL AMOUNT

Even if plaintiffs' post-removal stipulations and affidavits were effective to reduce their individual claims below $50,000, the court of appeals erred by concluding that the claims could not be aggregated to reach the jurisdictional amount. Although the general rule is that "separate and distinct claims" must individually meet the amount in controversy requirement, there are exceptions to this rule. The most significant exception concerns actions seeking to enforce "integrated" or "undivided" rights. The classic statement of this exception is found in *Pinel v. Pinel*, 240 U.S. 594 (1916), where the court stated:

> The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; *but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.*

240 U.S. at 596 (emphasis added).

In the district court and on appeal, Dow Chemical characterized the action as a suit to recover damages to a single source of income upon which each of the fishermen depended. Since none of the fishermen had any individual rights in the fish until they were caught, defendants asserted that the fishermen's claim involved loss of a common, prospective opportunity — not damage to any individual property rights. The court of appeals

rejected this contention and concluded that the plaintiffs were each "severally seeking as damages the income that each of them lost as a consequence of the chemical spill and compensation for the personal injuries they sustained." 988 F.2d at 563 (Appendix at 9a). The court of appeals based this conclusion on an analysis under federal maritime law — not common law or Colombian law — that the fishermen had "special commercial interests in the water and thus suffered an injury not suffered by the public at large." *Id.* (citing *State of Louisiana ex rel. Guste v. M/V Testbank,* 524 F.Supp. 1170, 1174 (E.D.La. 1981), *aff'd,* 752 F.2d 1019 (5th Cir. 1985)(en banc), *cert. denied,* 477 U.S. 903 (1976)).

Dow Chemical urges the Court to recognize that the court of appeals's decision misinterprets the nature of plaintiffs' claims. The question before the court of appeals was not whether the fishermen had suffered compensable injuries, but rather whether their cause of action was derived from common or individual rights. Although the court of appeals elected not to read the complaint "as a derivative suit for common damage to public resources," their refusal to do so conflicts with *Testbank* and the other authorities upon which they so strongly relied.

The principal case relied upon by the district court in *Testbank* was *Burgess v. M/V Tamano,* 370 F.Supp. 247 (S.D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977). The *Testbank* court expressly relied upon *Tamano's* holding that, although fishermen have no individual property rights to fish harmed by pollution, they could nevertheless sue for the "tortious invasion of a public right, having suffered damages greater in degree than the general public." *Testbank*, 524 F. Supp. at 1173; *see also Tamano*, 370 F. Supp. at 250. Thus, contrary to the court of appeals's holding, the fishermen's claims are, in fact, derivative from rights held by the public at large. The only difference is one of "degree." The common and joint character of the public right remains constant.

Viewed in this perspective, this action is indistinguishable from *Eagle v. American Tel. and Tel. Co.*, 769 F.2d 541 (9th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986). In *Eagle*, the plaintiffs' claims were aggregated because they derived from injuries to corporate assets in which they, by virtue of their shareholder status, held individual compensable interests. In this case, the claims should be aggregated because they are derived from injuries to public assets in which the fishermen, by virtue of their commercial status, have individual compensable interests. In both cases, the source of the claim is a common resource in which the plaintiffs have no individual rights, but in which, by virtue of their special status, they have individual compensatory interests. Accordingly, the fishermen are suing "to enforce a common and undivided interest which is separate and distinct as between themselves," *Eagle*, 769 F.2d at 547, n. 4, and the court of appeals erred by mischaracterized plaintiffs' claims and concluding that they could not be aggregated.

CONCLUSION

In summary, Dow Chemical urges the Court to grant its petition for certiorari. As the court of appeals candidly admitted, the question of how a district court should determine the amount in controversy is one "on which courts have disagreed and for which there is no clear answer in this Circuit." Indeed, aside from *St. Paul Mercury*, which the court of appeals refused to follow, this Court has provided no guidance either. Although the court of appeals based its decision on affidavits filed by plaintiffs' counsel, it failed to consider Dow Chemical's argument that the affidavits were legally defective. Dow Chemical objected to the legal sufficiency of the affidavits in the district court and re-asserted those objections on appeal. If the court of appeals had considered Dow Chemical's arguments and rejected the affidavits, the record would not have demonstrated that it was "legally certain" that the amount in controversy was less than $50,000, and federal jurisdiction would have been sustained. Any other result would unreason-

ably favor the rights of plaintiffs filing originally in federal court over the statutory right to a federal forum granted to a removing defendant. Finally, the court of appeals erred by failing to recognize the derivative nature of the rights of commercial fishermen and by failing to approve aggregation of these claims to reach the required amount in controversy.

For the reasons stated above, Petitioner The Dow Chemical Company respectfully prays that the Court grant a writ of certiorari in this matter and that, upon review, the judgment of the court of appeals be reversed, and the district court's judgment be affirmed.

Respectfully submitted,

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COMPANY

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2502

D.C. Docket No. CA H 91 0438

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,
Plaintiffs-Appellants,

versus

DOW QUIMICA DE COLOMBIA S.A., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before REYNALDO G. GARZA, GARWOOD and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court is reversed and vacated as to Dow Chemical with directions to remand to the 165th Judicial District Court of Harris County, Texas. The District Court's dismissal of Dow Quimica for lack of in personam jurisdiction is affirmed.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants two-thirds (⅔) of the costs on appeal, and plaintiffs-appellants pay to defendants-appellees one-third (⅓) of the costs on appeal to be taxed by the Clerk of this Court.

April 15, 1993

ISSUED AS MANDATE:

ASOCIACION NACIONAL DE PESCADORES
A PEQUENA ESCALA O ARTESANALES
DE COLOMBIA (ANPAC), *et al.*,
Plaintiffs — Appellants,

v.

DOW QUIMICA DE COLOMBIA S.A., *et al.*,
Defendants — Appellees.

No. 91-2502

United States Court of Appeals,
Fifth Circuit.

April 15, 1993.

Small-scale Colombian fishermen brought action in Texas state court against chemical manufacturer and its Colombian subsidiary arising out of pesticide spill. Manufacturer and subsidiary removed action and fishermen moved for remand. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., denied remand, dismissed subsidiary, and dismissed entire action on forum non conveniens grounds. Fishermen appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) fishermen were entitled to remand, and (2) fishermen did not establish requisite contacts for exercise of personal jurisdiction over subsidiary.

Affirmed in part; reversed and vacated in part.

1. Removal of Cases (key) 107(7)

Removing party bears burden of establishing basis for federal jurisdiction. 28 U.S.C.A. § 1441.

2. Removal of Cases (key) 74

Commercial fishermen did not have common and undivided interest in their source of income, namely, fish in a bay, so that their claims in action against chemical manufacturer which arose

out of pesticide spill could not be aggregated to reach amount in controversy required for removal on basis of diversity jurisdiction; each fisherman sought as damages income he lost as result of spill and compensation for personal injuries, claims for loss of economic opportunity would vary based on particular fisherman's equipment and expertise, value of "common source" of income was not finite and not ascertainable except by reference to income derived from it, and fishermen, who had special commercial interest in bay, suffered distinct injuries not suffered by public at large. 28 U.S.C.A. §§ 1332, 1441.

3. Removal of Cases (key) 75

Plaintiffs' statement in their petition in Texas state court that damages "far exceeded" minimal jurisdictional limits of that court furnished no basis for concluding that amount in controversy exceeded $50,000 required for removal on basis of diversity jurisdiction; at most, minimum amount required in Texas district courts is $500, and claims of all plaintiffs are aggregated to reach that amount. V.T.C.A., Government Code §§ 24.-009, 25.0003(c); 28 U.S.C.A. §§ 1332, 1441.

4. Removal of Cases (key) 74

Amount in controversy in Colombian small-scale fishermen's action for loss of income and personal injuries against chemical manufacturer arising out of pesticide spill in bay was facially unlikely to exceed requisite $50,000 amount in controversy for removal on basis of diversity jurisdiction; personal injuries were mentioned only cursorily and referred to as "skin rashes," and even fairly sustained loss of income to small-scale fishermen in Colombia was unlikely to reach $50,000. 28 U.S.C.A. §§ 1332, 1441.

5. Removal of Cases (key) 107(7)

District court could consider, in determining whether amount in controversy exceeded minimum required for removal on basis of diversity jurisdiction, affidavit of plaintiff's attorney stating that damages were less than $50,000 per plaintiff, even though that affidavit was filed with plaintiff's motion to remand; affidavit clarified state petition which left jurisdictional question ambiguous. 28 U.S.C.A. §§ 1332, 1441.

6. Removal of Cases (key) 75

Chemical manufacturer's allegation, in its petition to remove action by fishermen which arose out of pesticide spill, that matter in controversy exceeded $50,000, without any elaboration, was entitled to little weight in determining whether requisite amount for diversity jurisdiction was in controversy; in light of manufacturer's invalid argument that fishermen's damages could be aggregated, it was not clear that manufacturer was not merely asserting that sum of all fishermen's claims exceeded $50,000, and manufacturer did not offer, and probably could not have offered, any facts to support its valuation of claims. 28 U.S.C.A. §§ 1332, 1441.

7. Removal of Cases (key) 72

Removal petitions or other submissions by defendant are more likely to be persuasive in determining whether requisite amount in controversy for diversity jurisdiction exists where crucial facts supporting jurisdiction are known to defendant, especially in suits for injunctive or declaratory relief. 28 U.S.C.A. §§ 1332, 1441.

8. Removal of Cases (key) 102

Fishermen were entitled to remand of their action against chemical manufacturer arising out of pesticide spill in bay where complaint in state court did not specify amount of damage and it was not otherwise facially apparent that damage sought or in-

curred were likely above $50,000, manufacturer offered only conclusory statement in notice of removal that was not based on direct knowledge about fishermen's claims, and fishermen timely contested removal with sworn, unrebutted affidavit indicating that requisite amount in controversy was not present. 28 U.S.C.A. §§ 1332, 1441.

9. Removal of Cases (key) 107(9)

Court of Appeals would review district court's dismissal of defendant for lack of personal jurisdiction, even though dismissal occurred after removal and removal was improper; defendants' removal was not frivolous or contrived to have dismissed motion heard by plainly inappropriate tribunal, and question of personal jurisdiction was basically constitutional one and not matter of construing state law. 28 U.S.C.A. § 1441.

10. Removal of Cases (key) 107(7)

Plaintiffs had burden of proving jurisdictional contacts between defendant and forum required for exercise of personal jurisdiction by preponderance of evidence, even though plaintiffs' remand motion identifying potential jurisdictional contacts was in response to defendants' removal based on fraudulent joinder; one defendant filed motion seeking dismissal for lack of personal jurisdiction which could be considered prior to, and independently of, ultimate resolution of merits of motion to remand.

11. Federal Courts (key) 82

Alleged contacts of Colombian subsidiary of Texas chemical manufacturer with Texas did not support exercise of personal jurisdiction over subsidiary in action by Colombian fishermen arising out of pesticide spill in Colombia; fishermen alleged that it was probable that subsidiary purchased some of spilled chemicals from manufacturer's Texas plant and that subsidiary's Colombian licensing application for spilled chemicals relied upon at least five

technical documents produced in Texas, and fishermen produced blueprint bearing name of parent company and showing Colombian plant's valves, allegedly including valve from which spilled chemicals escaped.

12. Federal Civil Procedure (key) 1271

Plaintiffs were not entitled to further discovery aimed at establishing requisite contacts for exercise of personal jurisdiction over defendant, even though discovery was deferred while plaintiffs' motion to remand to state court was considered; case was removed two months before dismissal of defendant for lack of personal jurisdiction, and deferral was requested only for plenary discovery, not discovery into threshold jurisdictional issues.

Appeal from the United States District Court for the Southern District of Texas.

Before REYNALDO G. GARZA, GARWOOD, and DUHÉ, Circuit Judges.

GARWOOD, Circuit Judge:

Small-scale commercial fishermen from Colombia sued an American corporation and its Colombian subsidiary in state court for unspecified damages arising from a chemical spill. The American defendant removed to federal court, alleging that the Colombian defendant had been fraudulently joined to defeat diversity jurisdiction. The plaintiffs requested a remand to state court, arguing that the suit did not place the requisite amount in controversy and that there was not complete diversity. The plaintiffs bring this appeal from the district court's denial of their remand motion, dismissal of the Colombian defendant for lack of *in personam* jurisdiction, and dismissal of the entire suit on *forum non conveniens* grounds. We affirm in part and reverse and vacate in part with directions to remand to state court.

FACTS AND PROCEEDINGS BELOW

On December 21, 1990, a group of approximately 700 Colombian fishermen filed suit in Texas state court against Dow Chemical Company (Dow Chemical) and its wholly owned subsidiary Dow Quimica de Colombia, S.A. (Dow Quimica), a Colombian corporation. The fishermen sought damages arising from the spill of pesticide from a local Dow Quimica storage tank into the bay of Cartegena in Colombia on June 19, 1989. Their complaint alleged that the spill immediately killed tons of fish that would otherwise have been available for commercial harvest, and caused more lasting disruption of the food chain by killing various plant and animal life in the bay. The plaintiffs alleged that they had suffered grave economic losses, resulting in poverty and hunger. The plaintiffs further alleged that Dow Quimica had enlisted their help in removing the dead fish from the bay but had not warned them to take proper precautions against exposure to the pesticide, and as a result they had removed the fish with their bare hands and had suffered "personal injuries, including skin rashes." The theories of liability included negligence, strict liability, trespass, and nuisance. As mandated by Texas law for complaints seeking unliquidated damages,[1] the plaintiffs did not plead a specific amount in damages, alleging only that "[d]amages far exceed the minimum jurisdictional limits of this court."

One of the plaintiffs was the Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (ANPAC), an association incorporated under the laws of Colombia to promote the business interests of small-scale commercial fishermen.

On February 15, 1991, Dow Chemical removed the case to federal court. Its notice of removal alleged that Dow Quimica, a Colombian corporation with its principal place of business in Bogota, had no contacts with Texas that would support the

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[1] *See* Tex.R.Civ.P. 47(b); *Capitol Brick, Inc. v. Fleming Manufacturing Co.*, 722 S.W.2d 399, 401 (Tex.1986).

exercise of personal jurisdiction over it by a Texas court, and that Dow Quimica had been fraudulently joined to defeat diversity jurisdiction. The notice of removal further alleged that the amount in controversy exceeded $50,000, so that all requirements for diversity jurisdiction were met as to the plaintiffs and Dow Chemical. *See* 28 U.S.C. §§ 1332, 1441. Several days later, Dow Quimica filed a motion to dismiss for lack of personal jurisdiction, and Dow Chemical moved for dismissal on *forum non conveniens* grounds. Dow Chemical alleged that considerations of efficiency and fairness dictated that trial be held in Colombia.

On March 15, 1991, the plaintiffs moved to remand the case to state district court, alleging that the federal court lacked subject matter jurisdiction because there was neither complete diversity nor the requisite amount in controversy. They attached an affidavit from their Colombian attorney declaring that (1) the individual plaintiffs had each executed a power of attorney to ANPAC, and ANPAC was acting solely as their collection agent, and was not pursuing a claim on its own behalf; and (2) no individual fisherman suffered a loss greater than $50,000. The plaintiffs' motion also argued that the defendants had not met their burden of proving fraudulent joinder, which was to show that there was no possibility that the plaintiffs could establish a cause of action against Dow Quimica. The plaintiffs argued that, although there had been no discovery in the case, the requisite jurisdictional contacts probably existed, because Dow Chemical operated the world's largest chemical plant in Texas, and it was likely that the spilled chemical had been produced in part in Texas, and also because in licensing the chemical in Colombia Dow Quimica had relied on studies produced by Dow Chemical in Texas.

On April 16th, the district court entered an order (1) denying the plaintiffs' motion to remand; (2) dismissing Dow Quimica for lack of personal jurisdiction; and (3) dismissing the entire case on *forum non conveniens* grounds. ANPAC and the individual plaintiffs bring this appeal.

DISCUSSION

1. Amount in Controversy

[1] The initial question is whether the district court should have granted plaintiffs' motion to remand because the amount in controversy required to support diversity jurisdiction ($50,000) was not present. Dow Chemical, which as the removing party bears the burden of establishing the basis for federal jurisdiction, *Gaitor v. Peninsular & Occidental Steamship Co.*, 287 F.2d 252, 253-54 (5th Cir.1961), offers several arguments to support the conclusion that $50,000 was in controversy.

[2] The first is that the claims of individual plaintiffs may be aggregated to reach $50,000.[2] Although conceding that as a general rule aggregation is not allowed, Dow Chemical argues that this case falls within a recognized exception for instances in which the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Pinel v. Pinel*, 240 U.S. 594, 596, 36 S.Ct. 416, 417, 60 L.Ed. 817 (1916). Dow Chemical characterizes the suit as one to recover damages to a single source of income — the fish in the Bay of Cartegena — that the plaintiffs had a common opportunity to pursue. Under the common law, Dow Chemical points out, there are no individual property rights in animals *ferae naturae*. *Wiley v. Baker*, 597 S.W.2d 3, 5 (Tex.Civ.App. — Tyler 1980, no writ).

However, the plaintiffs are not asking that the court assign a value to the fishing rights in the Bay of Cartegena and award them each a *per capita* share of the diminution in that value resulting from the chemical spill. Rather, they are each severally seeking as damages the income that each of them lost as a consequence of the chemical spill and compensation for the personal injuries they sustained. The personal injury claims

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[2] Dow Chemical does not dispute that ANPAC is solely a collection agent and that its claim in excess of $50,000 does not confer jurisdiction.

clearly are individual and not aggregable. *See Eagle Star Insurance Co. v. Maltes*, 313 F.2d 778 (5th Cir.1963). The claims for loss of economic opportunity must also be classified as individual, for they will vary based on the particular plaintiff's fishing equipment, expertise, and so forth. Moreover, the value of the "common source" in which Dow Chemical argues that the plaintiffs are asserting an undivided interest is not finite and is not ascertainable except by reference to the income derived from it by the plaintiffs. Unlike a case in which an interest in property might be deemed indivisible because, for instance, its value secures two debts without priority,[3] in this case one plaintiff's recovery is neither dependent upon, nor necessarily reduced by, another's.

Although the right to fish in the Bay of Cartegena may have been shared by the public at large, the theory on which liability has been authorized in cases of this type is that the fishermen had special commercial interests in the water and thus suffered an injury not suffered by the public at large; as a consequence, their "specific pecuniary losses" could be recovered. *See State of Louisiana ex rel. Guste v. M/V Testbank*, 524 F.Supp. 1170, 1174 (E.D.La.1981), *aff'd*, 752 F.2d 1019 (5th Cir.1985) (en banc), *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1976); *accord Burgess v. M/V TAMANO*, 370 F.Supp. 247, 250 (D.Me.1973).

The cases relied upon by Dow Chemical, *Insurance Company of North America v. Chinowith*, 393 F.2d 916 (5th Cir.), *cert. denied*, 393 U.S. 990, 89 S.Ct. 474, 21 L.Ed.2d 453 (1968), and *Eagle v. American Telephone and Telegraph Co.*, 769 F.2d 541 (9th Cir. 1985), *cert. denied*, 475 U.S. 1084, 106 S.Ct. 1465, 89 L.Ed.2d 721 (1986), are both ones in which the plaintiffs were seeking essentially derivative recovery for injury to another person or entity. In *Chinowith* the heirs of a deceased worker sought workers compensation death benefits, and we allowed aggregation

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[3] *See Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39, 32 S.Ct. 9, 56 L.Ed. 81 (1911).

because the governing law provided only *"one right of recovery and one amount to be recovered*, even though that recovery must be divided according to the Texas laws of descent and distribution." *Id.* at 918 (emphasis in original). In *Eagle*, the court dealt with what was in substance a species of shareholder derivative action for a single injury to the corporation. However, in the present case, at least in theory, each plaintiff directly suffered a distinct injury that varied in degree; we do not read their complaint as a derivative suit for common damage to public resources. Rather, what binds their claims together is simply that their damages were caused by the same accident, a connection that cannot sustain aggregation. *Eagle Star Insurance Co., supra.*

If aggregation is not proper, Dow Chemical argues that the remand motion was nonetheless correctly denied because, under *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), a case may be removed unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* at 289, 58 S.Ct. at 590. Because in this case the complaint did not limit the plaintiffs to a particular dollar amount, and because it included allegations of "grave economic losses," personal injuries, and "catastrophic" loss of aquatic wildlife, Dow Chemical contends that the *St. Paul Mercury* test was met at the time of removal. Moreover, it argues jurisdiction must be assessed solely at the time of removal; the plaintiffs cannot avoid federal jurisdiction by later stipulating to an amount of damages below the jurisdictional minimum. *See id.* at 292, 58 S.Ct. at 592.

[3] Initially, it is important to note that in setting forth the test quoted above, the Supreme Court in *St. Paul Mercury* was describing the defendant's burden to obtain dismissal after the plaintiff has commenced a suit in federal court and claimed a specific amount of damages adequate to confer federal jurisdiction. In that situation, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," so the defendant

bears the heavy burden of showing, to a legal certainty, that the claimed amount cannot be recovered. *Id.* at 288, 58 S.Ct. at 590 (footnote omitted). In the present case, by contrast, the plaintiffs have never represented that their individual claims are worth more than $50,000.[4]

Whether the defendant's burden in contesting a remand motion is, as Dow Chemical argues, simply the inverse of his burden in obtaining dismissal, *i.e.*, to show that it does not appear to a legal certainty that the required amount in controversy is *not* present, is a question on which courts have disagreed[5] and for which there is no clear answer in this Circuit. We spoke to this question indirectly in our recent decision in *Kliebert v. Upjohn Co.*, 915 F.2d 142 (5th Cir. 1990), *reh'g en banc granted*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir.1991). In *Kliebert* the panel stated that this construction of the "legal certainty" test placed too light of a burden on a defendant seeking removal where the plaintiff had specified damages less than the jurisdictional minimum, but state law did not preclude him from recovering a larger amount than he sought in his complaint. *Id.* at 146. However, *Kliebert* was vacated for rehearing *en banc* and then settled. Accordingly, it is not precedential. Moreover, the present case deals with a situation not presented by either *Kliebert* or *St. Paul Mercury:* the plaintiff's petition did not specify a dollar amount of damages. Thus, the

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[4] The statement in their petition that "[d]amages far exceed the minimum jurisdictional limits of this court" furnishes no basis for that inference. The minimum amount in controversy for Texas district courts, although not entirely clear following recent constitutional and statutory changes, *see Peek v. Equipment Service Co.*, 779 S.W.2d 802, 803 n. 4 (Tex. 1989), is certainly no more than $500, *see* Tex.Gov't Code Ann. § 25.0003(c) (Vernon Supp.1992). Moreover, the claims of all plaintiffs are aggregated in determining whether this requirement is met. *Id.* § 24.009.

[5] *See Garza v. Bettcher Industries, Inc.*, 752 F.Supp. 753, 754-63 (E.D.Mich.1990) (discussing and criticizing the extension of the *St. Paul Mercury* "legal certainty" test to removal cases in which the plaintiff did not specify damages).

rationale of the *Kliebert* panel — that "[t]he allegations of a plaintiff's petition stating the amount of damages he has suffered is [sic] entitled to greater deference," *id.* — has little bearing here. The district court cases in this Circuit dealing with the precise situation presented here have not been entirely consistent.[6]

[4, 5] In this case, the injuries alleged in the plaintiffs' complaint are not ones that are facially likely to be over the jurisdictional amount. The personal injuries are mentioned only cursorily and referred to as "skin rashes," and even a fairly sustained loss of income to a small-scale fisherman in Colombia seems unlikely to reach $50,000. However, we also cannot say that the claims are *necessarily* outside of the range that could confer federal jurisdiction. That being the case, the plaintiffs' attorneys' affidavit stating that damages are less than $50,000 per plaintiff may be considered by the court in deciding whether remand is proper. Although Dow Chemical is correct that a plaintiff may not defeat removal by subsequently *changing* his damage request, because post-removal events cannot deprive a court of jurisdiction once it has attached, *St. Paul Mercury*, 303 U.S. at 292, 58 S.Ct. at 592, in this case the affidavits clarify a petition that previously left the jurisdictional question ambiguous. Under those circumstances, the court is still examining the jurisdictional facts *as of the time* the case is removed, but the court is considering information submitted after removal. At least one district court, also in a state that prohibits plaintiffs from specifying damages in their petitions, has considered a post-

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[6] *Compare Cedus v. Asplundh Tree Expert Co.*, 759 F. Supp. 319, 320-21 (W.D.La.1990) (denying a remand motion because the defendant had shown that it was not legally certain that the plaintiff would recover less than $50,000) *and Barton v. Allstate Insurance Co.*, 729 F.Supp. 56, 57 (W.D.Tex.1990) (same) *with Coleman v. Southern Norfolk*, 734 F.Supp. 719, 721 (E.D.La.1990) (granting a remand motion on the ground that the damage requests in similar suits arising from the same accident did not constitute the type of "affirmative showing" required of parties seeking removal).

removal affidavit by the plaintiff for this purpose. *See Cole v. Great Atlantic & Pacific Tea Co.*, 728 F.Supp. 1305, 1308-09 (E.D.Ky.1990); *accord Robinson v. Quality Insurance Co.*, 633 F.Supp. 572, 577 (S.D.Ala.1986) (granting a remand motion based on the plaintiff's post-removal insertion of an *ad damnum* clause into a previously indeterminate complaint); *cf. Hall v. Travelers Insurance Co.*, 691 F.Supp. 1406, 1410 (N.D.Ga.1988) (holding that although the attorneys' fees sought in the plaintiff's complaint appeared to bring his claim over the jurisdictional minimum, his statement in a brief opposing removal denying that his request put $10,000 in controversy warranted remand); *Denette v. Life of Indiana Insurance Co.*, 693 F.Supp. 959, 961 (D.Colo.1988).[7]

[6, 7] To support federal jurisdiction over this case, Dow Chemical has offered only its notice of removal, which merely states, without any elaboration, that "the matter in controversy exceeds $50,000 exclusive of interest and costs." Although it has frequently been held that when faced with a complaint for unspecified damages a court may look to the removal notice or petition in deciding whether the requisite amount is in controversy,[8] Dow Chemical's allegation of jurisdiction in this case carries little weight. First, in light of its argument regarding

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[7] If defendants wish to avoid the procedure of removing a case and then having it remanded after the plaintiff comes forward with an affidavit specifying his damages, there are other avenues available for clarifying an indeterminate complaint. Texas law, for instance, expressly provides that upon special exception by the defendant, the plaintiff may be required to amend his complaint to specify the maximum amount claimed. *See* Tex.R.Civ.P.47.

[8] *See, e.g., Kennard v. Harris Corp.*, 728 F.Supp. 452, 454 (E.D.Mich.1989); *Kilpatrick v. Martin K. Eby Construction Co.*, 708 F.Supp. 1241, 1424 (N.D.Ala.1989); *Smith v. Executive Fund Life Insurance Co.*, 651 F.Supp. 269, 270 (M.D.La.1986); *Rollwitz v. Burlington Northern Railroad*, 507 F.Supp. 582, 585 (D.Mont.1981); *McCurtain County Production Corp. v. Cowett*, 482 F.Supp. 809, 813 (E.D.Okla.1978); *Wright v. Continental Casualty Co.*, 456 F.Supp. 1075, 1077-78 (M.D.Fla.1978).

aggregation, the allegation of jurisdiction is at best ambiguous; it is not clear that Dow Chemical was not merely asserting that the sum, of all plaintiffs' claims exceeded $50,000. Second, Dow Chemical did not, and probably could not have, offered any facts to support its valuation of plaintiffs' claims. Removal petitions or other submissions by the defendant are more likely to be persuasive in cases where the crucial facts supporting jurisdiction are known to the defendant, especially suits for injunctive or declaratory relief. *See, e.g., Robinson*, 633 F.Supp. at 575; *Hale v. Billups of Gonzales, Inc.*, 610 F.Supp. 162, 164 (M.D.La.1985); *Family Motor Inn, Inc. v. L-K Enterprises Division Consolidated Foods Corp.*, 369 F.Supp. 766, 768-69 (E.D.Ky.1973). *But see Kennard v. Harris Corp.*, 728 F.Supp. 453, 454 (E.D.Mich.1989). The plaintiffs met Dow Chemical's statement in its removal notice with a sworn affidavit affirming that individual damages were less than $50,000. Nothing submitted by Dow even suggests the contrary. When specifically contested in a motion to remand, bare allegations by the removing party (much less statements in passing) have been held insufficient to invest a federal court with jurisdiction. *Rollwitz v. Burlington Northern Railroad*, 507 F.Supp. 532, 587 (D.Mont.1981); *Wright v. Continental Casualty Co.*, 456 F.Supp. 1075, 1077-78 (M.D.Fla.1978).[9]

[8] Therefore, we conclude that the motion to remand should have been granted. Without purporting to resolve the question of the removing party's burden in all situations, we hold that at least where the following circumstances are present, that burden has not been met: (1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above $50,000; (2) the defendants offered only a conclusory statement in their notice of

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[9] We do not mean to suggest that there may not be cases in which the court's "independent evaluation of jurisdiction," *Robinson*, 633 F.Supp. at 575, reveals that jurisdiction exists, even though the defendant can make only a conclusory assertion of jurisdiction, and that assertion is contested in a motion to remand.

removal that was not based on direct knowledge about the plaintiff's claims; and (3) the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.

II. Dismissal of Dow Quimica for Lack of Personal Jurisdiction.

The defendants request that even if we conclude that they were not entitled to removal, we nevertheless affirm the district court's dismissal of Dow Quimica for lack of personal jurisdiction. Although such a disposition is conceptually troubling in that it sustains an order by the district court in a case over which the court did not have subject matter jurisdiction, prior decisions in this Circuit, based on considerations of fairness to the defendant challenging jurisdiction, permit such an outcome. In *Walker v. Savell,* 335 F.2d 536 (5th Cir.1964), we upheld the trial court's authority to dispose of a motion to quash service of process before hearing a pending remand motion. *Id.* at 538-39; *accord Nolan v. Boeing Co.,* 736 F.Supp. 120, 122 (E.D.La.1990). *See also Jones v. Petty-Ray Geophysical Geosource, Inc.,* 954 F.2d 1061, 1066 (5th Cir.1992) (citing *Walker* and *Nolan).*

[9] In determining whether such a disposition would be proper here, we observe that this case presents an instance in which the competing concern — federal intrusion into state courts' authority — is minimized. First, the defendants' removal was not frivolous. Although we concluded that a remand was warranted, at the time the defendants removed the case there was arguable merit to their request. Thus, they did not contrive to have Dow Quimica's dismissal motion heard by a plainly inappropriate tribunal. Second, the question of personal jurisdiction here is basically a constitutional one, not a matter of construing Texas law. *See Guardian Royal Exchange Assurance, Lt. v. English China Clays, P.L.C.,* 815 S.W.2d 223, 226 (Tex.1991) (Texas long-arm statute reaches as far as the federal constitutional requirements of due process will allow). Because the ultimate arbiter of this

question of personal jurisdiction would be the United States Supreme Court, not the Texas Supreme Court, it is less intrusive for a federal court to decide the issue. For these reasons, we will consider the question of Dow Quimica's amenability to suit in Texas.

The original complaint in this case stated that the court had *in personam* jurisdiction over Dow Quimica, but did not allege any facts to support this conclusion. And, as previously noted, the plaintiffs' remand motion merely alleged two "likely contacts" of Dow Quimica with Texas: (1) it was probable that Dow Quimica purchased some of the spilled chemicals from Dow Chemical's Texas plant, and (2) according to files from the Colombian Ministry of Health, Dow Quimica's licensing application for the spilled chemicals relied upon at least five technical documents produced in Texas. The motion stated that verification of the first contact, and identification of others, would have to await discovery in the suit. Finally, at the hearing before the district court on the remand motion and the motions to dismiss, the plaintiffs offered a third contact: a blueprint bearing the label "Dow Chemical U.S.A." and showing the plant's valves, apparently including the valve from which the chemical escaped.

The plaintiffs argue to this Court that because their remand motion was in response to Dow Chemical's removal based on fraudulent joinder, the burden rested with Dow Chemical, and this Court should find for the plaintiffs if it finds "any possibility of recovery against the party whose joinder is questioned." *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.1990), *cert. denied*, 498 U.S. 817, 111 S.Ct. 60, 112 L.Ed.2d 35 (1991). Thus, the plaintiffs argue, their mere identification of potential jurisdictional contacts suffices at this stage.

[10-12] We disagree. Dow Quimica filed a motion with the district court seeking dismissal for lack of personal jurisdiction,[10] and our foregoing discussion indicates that this motion can be considered prior to, and independently of, ultimate resolution of the merits of the motion to remand. Therefore, the burden, albeit a slight one, rests with the plaintiffs: though they need not prove the jurisdictional contacts by a preponderance of the evidence, they must present facts sufficient to constitute a *prima facia* case of personal jurisdiction. *Bullion v. Gillespie,* 892 F.2d 213, 216-17 (5th Cir.1990); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989). The speculative contentions in their remand motion are not adequate, and the blueprint presented at the hearing, though it may suggest some type of connection to the United States, does not particularly suggest a connection to Texas. Moreover, the plaintiff's contention that they were entitled to further discovery is unavailing; the case was removed two months before dismissal, and the record reflects that a deferral was requested only of plenary discovery — not of discovery into threshold jurisdictional issues. We hold that the district court properly dismissed Dow Quimica for want of *in personam* jurisdiction.

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[10] The motion was supported by affidavit of Dow Quimica's president stating, *inter alia*, that Dow Quimica is a Colombian corporation, is not authorized to do business in Texas, has no agent there for service of process, maintains no facilities, records, or bank accounts in Texas, has no employees based there, does not recruit employees there, has not entered into any contracts wholly or partly performable in Texas, does not sell or distribute products in Texas, and has not committed a tort in Texas. There was nothing before the district court to rebut any of this.

CONCLUSION

For the foregoing reasons, we reverse and vacate the district court's judgment as to Dow Chemical with directions to remand to the 165th Judicial District Court of Harris County, Texas[11] We affirm the district court's dismissal of Dow Quimica for lack of *in personam* jurisdiction.

AFFIRMED IN PART; REVERSED AND VACATED IN PART.

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[11] Given our disposition of the case, the defendants' request that we impose sanctions on the plaintiffs for filing and prosecuting a frivolous appeal is obviously denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2502

ASOCIACION NACIONAL DE
PESCADORES A PEQUENA
ESCALA O ARTESANALES DE
COLOMBIA, (ANPAC) *et al.*,
Plaintiffs-Appellants,

versus

DOW QUIMICA DE COLOMBIA S.A., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion April 15, 1993, 5 Cir., ..., ... F.2d .....)

(September 8, 1993)

Before REYNALDO G. GARZA, WILL GARWOOD and DUHE, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the

Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

WILL GARWOOD
United States Circuit Judge

Judge Goldberg did not participate in the consideration of the suggestion for rehearing en banc.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

September 23, 1993

Mr. Richard O. Faulk
Attorney at Law
Houston, TX 77002

No. 91-2502 — ASOCIACION v. DOW QUIMICA
(D.C. No. CA-H-91-0438)

MANDATE STAYED TO AND INCLUDING
OCTOBER 15, 1993

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of the rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are

copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR.,
Clerk

By: Cindy M. Broadhead
Deputy Clerk

Enclosures
(Letter Only)
cc: Mr. Richard P. Clem

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ASOCIACION NACIONAL DE PRESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiffs,

versus

DOW QUIMICA DE COLOMBIA, S.A., *et. al.*,

Defendants.

CIVIL ACTION H-91-0438

ORDER OF DISMISSAL

1. ANPAC's motion to remand (#8) is denied.

2. ANPAC's motion to defer ruling on Dow's motions to dismiss (#6) is denied.

3. Dow's motion to strike the affidavits supporting ANPAC's motion to remand (#15) is denied.

4. Dow Quimica de Colombia, S.A. is dismissed under Rule 12(b)(2). (#2).

5. The entire case is dismissed for *forum non conveniens.* (#4).

6. The parties' agreed motion to defer plenary discover pending resolution of Dow's motions to dismiss is denied as moot.

Signed on April 16th, 1991, at Houston, Texas.

LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated,

to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat .2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646.)

Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq. §§ 30-43. See, also, reviser's note under section 1331 of this title.)

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
... JUDICIAL DISTRICT

No. 90-066186

ASOCIACION NACIONAL DE
PESCADORES A PENQUENA ESCALA O
ARTESANALES DE COLOMBIA (ANPAC)

AND

Enrique Ahumada, Tony Ahumado Castro, Edna Efrain Ahumado, Alejandro Ahumedo Edna, Otoniel Ahumedo Morales, Clemente Ahumendo Morelo, Manuel Ahumedo Sosa, Victor Ahumedo Sosa, Manuel Ahumedo Zabaleta, Leonidas Altamar Herrera, Juan Martinez Altamiranda, Esteban Alvares M., Sisteban Alvarez Martinez, Juan Angulo Ahumedo, Pablo Angulo de la Rosa, Julian Angulo Salcedo, Jose Angulo Yerena, Modesto Arevalo Arevalo, Sillfredo Arevalo Arevalo, Famil Arevalo Berrio, Modesto Arevalo Bravo, Guillermo Arevalo Garcia, Nicolas Arevalo Garcia, Jose Manuel Arevalo Guerrero, Marcelino Arevalo Guerrero, Vicente Arevalo Guerrero, Adolfo Arevalo Hernandez, Alvaro Arevalo Hernandez, Argemiro Arevalo Hernandez, Aureliano Arevalo Hernandez, Carlos Arevalo Hernandez, Dagoberto Arevalo Hernandez, Juan Arevalo Hernandez, Marcelino Arevalo Hernandez, Marcial Arevalo Hernandez, Ramiro Arevalo Hernandez, Victor Arevalo Meza, Jose Arevalo Morales, Alfonso Arevalo Pajaro, Concepcion Arevalo Pajaro, Nicolas Arevalo Pajaro, Oswaldo Arevalo Pajaro, Macot Arevalo Reyes, Norberto Arevalo Villero, Arturo Arispe Carlos, Eber Arispe Porto, Victor Arrieta Berrido, Fernando Banquez Rodriguez, Orlando Banquez Rodriguez, Fransisco Barbosa de Avila, Raul Barrio Paiaro, Facundo Barrios Castro, Roberto Barrios Leal, Yamil Barrios Rodriguez, Leonidas Barrios Rosi, Anibal Batista Rodriguez, Jose Antonio Bedoya

Gonzalez, Fulgencio Beltran Leon, Julio Benevides Morelos, Pedro Berrio Hernandez, Pedro Berrio Julio, Misael Berrio Pajaro, Pedro Berri o Pajaro, Fransisco J. Blanco Diaz, Eugenio Blanquicet Avila, Enrique Blanquicet de Avila, Jose Blanquisett Arias, Isaac Bravo Godoy, Roberto Bravo Herrera, Pedro Bravo, Gullermo Bustamante Ortega, Humberto Bustamante Ortega, Pedro Bustamente Wilches, Bernardo Caballero San Martin, Edison Calderon Leal, Jose Calle de Avila, Prudencio Calle Medrano, Pablo Campillo Ahumedo, Jose Campillo Castellano, Rafael Campillo Crismat, Gildo Campillo Crismatt, Hernando Campillo Crismatt, Fernando Campillo, Jaima Cantillo Torres, Robinson Caraballo Emitora, Roberto Caraballo Hernandez, Emil Caraballo Morales, Leonitt Caraballo Morales, Elberto Caraballo Ospina, Gilberto Caraballo Ospina, Faustino Cardales Suarez, Alizardo Carmona, Santiago Carreazo Ahumedo, Teofilo Carreazo Paternina, Luis Carrillo Masa, Egna Castillo Rafael, Julio Castro Alberto, Aurelio Castro Altamiranda, Jose Isabel Castro Altamiranda, Enoc Castro Angulo, Denis Castro Barrios, Bernabet Castro Blanquicet, ciro Castro Blanquicet, Hilario Castro Blanquicet, Vidal Castro B., Ever Castro de la Rosa, Celso Castro Fernandez, Guillermo Castro Hernandez, Alfonso Castro Leal, Rodolfo Castro Marruego, Oscar Castro Olivo, Aquilino Castro Otero, Tomas Casto Villa, Cristino Celis Villarreal, Hernan Cerbante Pajaro, Octavio Cero Polo, Eduardo Conteras Arevalo, Manuel Contreras H., Idulfo Contreras, Orlando Contreras Lopez, Pedro Contreras Morales, Ustreberto Conteras Moraloes, Jose Contreras Munoz, Jose Contreras Ospina, Arnulfo Contreras Pimentel, David Contreras Polo, Donaldo Luis Contreras Polo, Marcos Contreras P., Celestino Corpa Vasquez, Benito Crismatt Angulo, Crispiniano, Agustin Cuadro Blanquicet, Miguel Chavez Martinez, Pedro de Arco Sanchez, Saul de Avila Botero, Saul de Avila Caicedo, Isidoro de Avila Godoy, Angel L. de Avila Guzman, Walfre de Avila Julio, Omar de Avila, Miguel de Avila Otero, Isaias de Avila Seca, Macot de la M. Rodriguez, Jose de la Rosa Guerrero, Maximiliano de la Rosa

Herrera, Julian de la Rosa Leon, Orlando de la Rosa Leon, Juan de la Rosa Martinez, Jose de la Rosa Medina, Wilmer de la Rosa Morales, Juan Alberto de la Rosa Ortiz, Edilberto de la Rosa Viana, Rafael de la Rosa Viana, Manuel de los Reyes Herrera, Manuel Delgado Jimenez, Eulali Dias de la Rosa, Julio Diaz Barbosa, Pablo Diaz Castro, Alberto Diaz Guerrero, Amalfil Diaz Guerrero, Catalino Diaz Guerrero, Edison Diaz Guerrero, Eustorgio Diaz Guerrero, Luis Diaz Guerrero, Bartolo Diaz Medrano, Marcelino Diaz Ocan, Alejandro Diaz Perez Alvaro Diaz Perez, Juan Diaz Polo, Rafael Diaz Polo, Arevalo Dionicio Torres, Cristobal Elles Caraballo, Fredy Emitola Avila, Oswaldo Emitola Avila, Feliz Emitola Vasquez, Luis Eulice s Escandon Gomez, Ramiro Espinosa Castilla, Norberto Fajanet Zumaque, Rafael Fajardo Castro, Edison Fernandez Cardales, Catalina Fernandez Silgado, Jose Fruto Cortes, Pedro Fuentes Pereez, Domingo Garcia Carmona, Jose Luis Garcia Diaz, Gilberto Garcia Medrano, Rafael Garcia, Alejandro Garica C., Arnold Garrido Contreras, Jaime Garrida Contreras, Jairo Garrido Contreras, Rufo Garrido Contreras, Otoniel Garrido Correa, Otoniel Garrido Correda, Freddy Garrido Dominguez, Rodolfo Farrido Dominguez, Domingo Garri do Guerrero, Juan Gerrero Cvordales, Morales Gilberto Caraballo, Carlos Gomez Castro, Blas Gomez Cervantes, Jose M. Gomez de la Rosai Pablo Gomez Medrano, Tatis Gonzalez Abel, Rondy Gonzalez Anaya, Amaurys Gonzalez Avila, Jose Gonzalez Avila, Luis M. Gonzalez Avila, Walder Gonzalez Contreras, Santiago Gonzalez Cordoba, Jose Gonzalez Gomez, Manuel D. Gonzalez Gomez, Abraham Gonzalez Herrera, Claro Gonzalez Herrera, Humberto Gonzalez Herrera, Raul Gonzalez Herrera, Abraham Gonzalez Medrano, Jesus Gonzalez Medrano, Tomas Gonzalez Medrano, Guillermo Gonzalez Rodriguez, Fernando Guerrero Abel, Armando Guerrero, Pedro Guerrero Blaguiset, Enrique Guerrero Brut, Fredy Guerrero Brut, Mario Guerrero Brut, Abelardo Guerrero Calle, Epifanio Guerrero Elles, Anibal Guerrero Emitola, Dilson Guerrero Julio, Gabriel Guerrero Oyola, Abelardo Guer-

rero Pajaro, Justino Guerrero Pajaro, William Guerrero Pajaro, Daniel Guerrero Pombo, Cerafin Guerrero Villero, Juan Guerrero, Villeros, Cristobal Gutierrez Castro, Ismael Herazo Iriarte, Julio Herera Mendoza, Angel Hernandez Arevalo, Dorly Hernandez Arevalo, Hernan Hernandez Contreras, Nicacio Hernandez Julio, Edison Hernandez Morales, Inocencio Hernandez Morales, Jorge Eliece Hernandez Villeros, Ambrosio Hernandez Arevalo, Antonio Hernandez Arevalo, Cesar Hernandez Arevalo, Lucilo Hernandez Arevalo, Joaquin Hernandez Jose, Edison Hernandez Morales, Juan Hernandez Moreno, Jose Joaquin Hernandez Torres, Alberto Hernandez Villero, Benjamin Hernandez Villero, Jose Hernandez Villero, Washingtong Hernandez Villero, Jose Miguel Herrera Acevedo, Guillermo Herrera Ahumada, Jesus Herrera Ahumado, Pedro Herrera Cardenas, Milton Herrera Castro, Benjamin Herrera de la Rosa, Daniel Herrera de la Rosa, Manuel Herrera Diaz, Miguel Herrera Fontalvo, Alberto Herrera Gomez, Luis Herrera Julio, Jifdn Herrera Lian, Manuel Demetrio Herrera Matos, Adan Herrera Medrano, Manuel Herrera Pacheco, Atanasio Herrera Paternina, Giovani Herrera Paternina, Heder Herrera Paternina, Jose Herrera Paternina, Demetrio Herrera Perez, Guillermo Herrera Rodriguez, Victor Herrera Rodriguez, Estuardo Herrdra Vasquez, Milton Herrera Vasquez, Jaime Imitola Avila, Jiliar Imitola Avila, Aristoteles Imitola Caraballo, Walberto Imitola Diaz, Aristides Imitola Medrano, Zenon Imitola-Vasquez, Fabio Jaramillo de la Barrera, Orlando Jaramillo de la Barrera, Jose Jimenez Altamar, Wilmar Jimenez Gonzalez Eliecer Jiminez Sosa, Jaime Julio Martinez, Nicolas Julio Matute, Ismael Julio Pereira, Wilfrido Julio Villeros, Lazaro Lastra Cervantes, Miguel Lastra Guerrero, Alejandro Leal, Hernando Leon Leal, Jose M. Lopez Orozco, Jose LLereiTa Acevedo, Miguel LLerena, Alfredo LLoreda Arevalo, Omar Marino de la Rosa, Manuel Marquez Martinez, Manuel Marquez Pajaro, Saturnino Marriaga Amaranto, Antonio Marriaga Perez, Felix Marriaga Perez, Jose de la C. Marriaga Perez, Jose Fransisco Marriaga Perez, Saturnino Marriaga Perez, Misael

Marriga Perez, Alfonso Marrugo Julio, Jaime Marrugo Pajaro, Luis Martinez Barraza, Luis Martinez Guerrero, Alejandro Martinez Rebollo, Luis Felipe Matos Diaz, Pedro Matuta Ramirez, Humberto Matute Ramirez, Jorge Matute Ramirez, Martin Matute Ramirez, Alberto Medrano Caicedo, Arcelio Medrano Castro, Tomas Mendoza Castro, Dionisio Mendoza Colon, Felix Mendoza Herrera, Orlando Mendoza Olivo, Rafael Mendoza Olivo, Tomas Mendoza Olivo, Andres Mendoza San Martin, Orlando Mendoza San Martin, Santiago Mendoza Sanmartin, Luis Merelos Julio, Pedro Mesa Martinez, Senibaldo Miranda Diaz, Bernardo Miranda Fernandez, Ignacio Miranda Julio, Angel Moncaris Caicedo, Enrique Moncaris Caicedo, Julio Moncaris, David Morales Aravalo, Alcides Morales Guerrero, Capernan Morales Guerrero, Edgar Hernandez Morales, Blas Morales Marrugo, Temistocle Morales Villero, Ubadel Morales Villero, Diego Morelos Julio, Manuel Morelos Julio, Marceliano Morelos Julio, Maximo Morelos Julio, Jose Morelos Valderrama, Rodolfo Moreno Berrio, Antonio Moreno Cardales, Dagoberto Moreno Cardales, Juan Moreno Cardales, Juan M. Moreno Crespo, Jose Moreno Julio, Numas Manuel Moreno Julio, Luis E. Moreno Pena, Yoderna Nestor, Alfredo Ojeda Aguilar, Santander Ojeda Jiminez, Victor Ojeda, Hernan Olives Rodriguez, Pedro Olivo Vivero, Urbano Olivo Vivero, Rafael Ovidio Osorio Cervantes, Jaime Osorio Rivera, Acisclo Otero de Avila, Juan Otero de Avila, Victor Otero de Avila, Juan Antoniuo Otero Guzman, Feliciano Otero Vasquez, Jose Oviedo Guerrero, Vicente Oviedo Guerrero, Edilberto Padilla, Rafael Padilla Hernandez, Simon Padilla Hernandez, Fransisco Padilla Herrera, Miguel Padilla Julio, Pedro Padilla Julio, Rafael Pajaro Arevalo, Victor Pajaro Lobo, Juan Pajaro Ortiz, Maximo Pajaro Villero, Cesar Pajaro Villeros, Remberto Pajaro Villero, Juan M. Palomino, Henry Pasada Mendoza, Juan Paternina Cera, Wilson Paternina Contrara, Rembinbero Paternina Contreras, Eusebio Pautt Diaz, Alberto Pautt Martinez, Edwin Perez Caraballo, Joaquin Perez, Adolfo Perez Julio, Arnulfo Perez Medrano,

Ulises Perez Medrano, Eusebio Perez Segivia, Juan Perez Segovia, Alejandro Pimentel Contreras, Manuel E. Pimentel Leal, Omar Pimentel Leal, Nelson Pineda Altamar, Gualberto Pineda Jimenez, Luis Pinedo Rosis, Antonio Polo, Calixto Polo Medrano, Angel Polo Orozco, Jose Polo Orozco, Juan Polo Orozco, Reinaldo Polo Orozco, Juan Polo Pajaro, Victor Polo, Robinson Porto Jimenez, Ruter Porto Jimenez, Wilfredo Porto Jimenez, Wilfrido Porto Pajaro, Luis Pua Arrieta, Rafael Puas Colon, Wilson Puello Otero, Juan Alberto Ramos Caicedo, Nelson Ramos, Jorge Restrepo Contreras, Jose Rodriguez Ahumada, Teodoro Rodriguez Ahiumedo, Teofilo Rodriguez Ahumedo, Alfredo Rodriguez, Apolinar Rodriguez Angulo, Israel Rodriguez Angulo, Temistode Rodriguez Angulo, Manuel Rodriguez Baldelamar, Leoncio Rodriguez Cardales, Luis Rodriguez Escobar, Juan Rodriguez, Juan Alberto Rodriguez, Alfonso Rodriguez Macot, Blas Rodriguez Macott, Gildo Rodriguez Macott, Teofilo Rodriguez Macott, Silfredo Rodriguez Meza, Alfonso Rodriguez Morales, Alvaro Rodriguez Pajaro, Luis Rodriguez Pajaro, Patrocinio Rodriguez, Remberto Rodriguez Rodriguez, Enrique Rodriguez Romero, Jaime Rodriguez R., Emel Rodriguez Valdelamar, Arquimedes Romero, Alberto Romero Barbosa, Angel Romero Barbosa, Domingo Romero Barbosa, Edagar Romero Barbosa, Ignacio Romero Barbosa, Enrique Romero, Domingo Romero Herrera, German Romero Herrera, Ignacio Romero Herrera, Hever Romero Rodriguez, Remberto Romero R., Luis Rosillo Romero, Angel Maria Sabala Escobar, Isidoro Sabala Escobar, Rafael Sabala Escobar, Nicolas Salas Puello, Pajarro Samuel Barrio, Miguel Sanmartin Blanco, Hermogenes Sarmartin Sosa, Domingo M. Santo, Enrrique Alberto Seco de Avila, Sixto Silcado Arzusa, Isaias Silva Jimenez, Oscar Sosa Cardales, Juan Sosa Pacheco, Victor Vidal Sosa Pacheco, Miguel A. Sosa Pacheco, Manuel J. Teran, Juan Torres Angulo, Wilfredo Torres Arevalo, Ferni Torres Guerrero, Robinson Torres Guerrero, Luis Alfredo Torres Osorio, Rafael Torres Pena, Jorge Torres Salinas, Jose F. Valderrama Herrera, Manuel Vasquez Diaz, Gabriel

Vasquez Imitola, Efrain Enrique Vasquez Salgado (No. 895,090), Efrain Erique Vasquez Salgado (No. 895,570), Fransisco Vasquez Salgado, Alberto Villa Aguilar, Bruno Villa Contreras, Eduardo Villa Contreras, Gilberto Villa Contreras, Manuel Villa Contreras, Roberto Villa Contreras, Alberto Villa Guerrero, Yobanis Villa Guerrero, Jose Manuel Villa Lopez, Manuel Esteban Villa Lopez, Miguel Manuel Villa Lopez, Teobaldo Villa Lopez, Jesus Villa Munoz, Gilberto Villero Arevalo, Leonidas Villero Arevalo, Lorenzo Villero Arevalo, Luis C. Villero Arevalo, Manuel Villero Arevalo, Manuel Jose Villero Arevalo, Reinaldo Villero Arevalo, Benigno Villero Blanquicet, Geral Villero Blanquicet, Concepcion Villero Escudero, Crispiniano Villero Escudero, Rafael Villero Garcia, Heriberto Villero Guerero, Amin Villero Guerrero, Ariel Villero Guerrero, Manuel Villero Hernadez, Abrahan Villero Hernandez, Carlos Villero Hernandez, Jose Villero Hernandez, Jose de S. Villero Hernandez, Rosalio Villero Hernandez, Andres Villero Lopez, Cristobal Villero Lopez, Abigail Villero Morales, Alcides Villero Moreno, Euclides Villero Moreno, Manuel Villero Moreno, Ortiz Villero Moreno, Vidal Villero Moreno, Dagoberto Villero Pajaro, Jorge Villero Pajaro, Jose Villero Pajaro, Oscar Villero Pajaro, Emiro Villero Vives, Enrique Villero Vives, Oswaldo Villero Vives, Julio Villero Wilfreds, Felipe Villeros Cardales, Dario Villeros Morales, Fabio Villeros Vives, Orlando Villrero Guerrero, Apolinar Vives, Fernel Vives Pajaro, Leonel Vives Pajaro, Vicente Vives Vicente, Andres Wilches Castro, Anselmo Yanez Caballero, Manuel Demetrio Yanez Salas, Alfredo Zabala Escobar, and Maximo Zabala Escobar,

Plaintiffs

VS

DOW QUIMICA DE COLOMBIA, S.A.,
AND
DOW CHEMICAL COMPANY,

Defendants

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs (as named above), complaining of Defendants, DOW QUIMICA DE COLOMBIA, S.A. and DOW CHEMICAL COMPANY, by and through their attorneys, and allege as follows:

SUMMARY OF CASE

1. This is a major personal injury and economic damage case arising out of the June 19, 1989, pesticide spill into the Bay of Cartagena, Colombia. The plaintiffs are small-scale commercial fishermen who were injured by that spill. Defendants are the American and Colombian corporations which owned and operated the chemical plant from which the toxic chemical spilled. Damages far exceed the minimum jurisdictional limits of this court.

PARTIES AND JURISDICTION

2. Plaintiff, ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALAO ARTESANALES DE COLOMBIA (hereafter referred to as "ANPAC"), is an association incorporated under the laws of the Republic of Colombia for the purpose of promoting the personal well being and business interests of its members, all of whom are small-scale commercial fishermen in said Republic.

3. All other Plaintiffs are commercial fishermen residing in or near the City of Cartagena, Republic of Colombia, who earn a living from harvesting the once-bountiful population of fish from the waters in and around the Bay of Cartagena, Colombia.

4. All individual Plaintiffs are members of ANPAC, and have granted to ANPAC powers of attorney to prosecute their claims before this Honorable Court.

5. Plaintiffs have standing to present their claims to this Honorable Court by virtue of Article XIII of the treaty signed in Bogota on December 12, 1846, and ratified by the Senate on June 12, 1848, between the United States of America and the Republic of New Granada, now known as Colombia.

6. Defendant DOW QUIMICA de COLOMBIA, S.A., is a foreign corporation incorporated under the laws of the Republic of Colombia, and service of process may be accomplished through the Secretary of State, to be forwarded to Mr. Rafael Pavia, whose address is Transversal 18, No. 78-80, Bogota, Colombia, and who is authorized under the laws of the Republic of Colombia to accept service of process on behalf of Defendant DOW QUIMICA de COLOMBIA, S.A.

7. Defendant, DOW CHEMICAL COMPANY is a corporation incorporated under the laws of the State of Delaware and is authorized to do business in the State of Texas, and service of process may be accomplished through its registered agent, CT Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

8. This court possesses both personal and subject matter jurisdiction over the parties and causes of action asserted in this Petition.

9. Defendant, DOW QUIMICA de COLOMBIA operates a chemical plant in the Mamonal Industrial Area, City of Cartagena, Republic of Colombia. Hereinafter, that chemical plant is referred to as the "Mamonal Plant."

10. On information and belief, Defendant DOW CHEMICAL COMPANY, and its agents and employees in the United States of America, exercise a large measure of control and supervision over the activities of the Mamonal Plant.

11. Defendant DOW QUIMICA de COLOMBIA is a wholly owned subsidiary of Defendant DOW CHEMICAL COMPANY.

THE CHEMICAL

12. The Mamonal Plant produces, among other things, the pesticide LORSBAN 4E. LORSBAN 4E consists of the active ingredient Chlorpyrifos (whose chemical name is 0,0-diethyl 0-(3,5,6 — trichloro-2-pyridyl) phosphorothioate) dissolved in the solvent xylene.

13. On information and belief, the LORSBAN 4E produced by the Mamonal Plant is a blend of Chlorpyrifos manufactured in the United States of America by Defendant DOW CHEMICAL COMPANY, and xylene imported from suppliers currently unknown to Plaintiffs.

14. Chlorpyrifos and LORSBAN 4E are highly toxic to fish and other elements of the aquatic food chain. Such toxic propensities are well known, and were known to Defendants at all relevant times.

THE ACCIDENT

15. On or about June 19, 1989, an agent or employee of Defendants caused a certain valve to remain open at the Mamonal Plant. This open valve caused a certain storage tank to fill to over-flowing with LORSBAN 4E.

16. As a result of this valve's being left open, over 6,500 litres of LORSBAN 4E escaped from the tank.

17. The Mamonal plant had a containment dike which was purportedly designed to contain such spills and which gave neighboring citizens an illusion of safety. In reality, however, this containment dike was in a bad state of disrepair, and was wholly unsuited for its intended purpose.

18. A significant portion of the containment dike was made of copper. It is well known, and was known to Defendants at all relevant times, that copper is highly soluble in xylene. For this reason, a containment dike made partially of copper is wholly

unsuitable for containing spills of a compound, such as LORSBAN 4E, containing xylene.

19. As a direct result of the valve's being left open, of the tank's being allowed to overflow, and of the woeful inadequacy of the containment dike, a substantial portion of the LORSBAN 4E escaped the grounds of the Mamonal plant.

20. This escaped LORSBAN 4E found its way into a stream adjoining the Mamonal Plant and ultimately into the Bay of Cartagena.

21. The escaped LORSBAN 4E had the immediate effect of killing, within a few hours, many tonnes of fish which would have been otherwise suitable for immediate commercial harvest. In addition, the escaped LORSBAN 4E killed untold millions of fish eggs and fingerlings. The escaped LORSBAN 4E also killed untold millions of smaller aquatic flora and fauna, which form indispensible links in the marine food chain.

22. This gross disruption of the food chain has had, and will continue to have, the effect of limiting commercial fish harvests in the area, because the smaller creatures upon which commercial-grade fish feed have been killed in catastrophic numbers.

23. The escaped LORSBAN 4E has remained, and will remain in the Bay of Cartagena. Thus, fish, eggs, fingerlings, and elements of the food chain will continue to die from this pollution.

24. As a direct result of this pollution, Plaintiffs have suffered grave economic losses from the inability to fish and from greatly diminished harvests.

25. These economic losses have caused severe hardship, poverty, hunger, and deprivation for Plaintiffs and their families.

26. Shortly after the spill, Defendants enlisted Plaintiff fishermen to remove the dead fish from the area of the bay.

27. Even though LORSBAN 4E is a skin irritant and toxic to humans, Defendants did not advise Plaintiffs that they must take proper safety precautions to limit exposure to this toxic chemical.

28. Because of Defendants' failure to warn Plaintiffs of these hazards, Plaintiffs removed the dead, contaminated, fish from the bay with their bare hands.

29. As a result of this exposure to LORSBAN 4E, Plaintiffs suffered personal injuries, including skin rashes.

30. Defendants are jointly and severally liable to Plaintiffs under the laws of the Republic of Colombia, the State of Texas, or any other civilized place whose laws are implicated herein, under the following legal theories:

FIRST CAUSE OF ACTION
(Negligence)

31. Defendants are liable for their negligence in designing, constructing, and operating the Mamonal Plant in such a manner as to allow the toxic LORSBAN 4E to escape.

SECOND CAUSE OF ACTION
(Strict Liability — Hazardous Activity)

32. Defendants are strictly liable for harm resulting from the operation of a chemical plant near a river and bay, an inherently hazardous activity.

THIRD CAUSE OF ACTION
(Strict Liability — Chemicals Stored in Large Quantities)

33. Defendants are strictly liable for the release of a chemical when such chemical is stored in large quantities, it being likely that such chemical would wreak great mischief if released.

FOURTH CAUSE OF ACTION
(Products Liability)

34. Defendants are liable under a theory of strict product liability.

FIFTH CAUSE OF ACTION
(Trepass)

35. Defendants are liable to Plaintiffs under a theory of trespass.

SIXTH CAUSE OF ACTION
(Nuisance)

36. Defendants are liable to Plaintiffs under a theory of nuisance.

SEVENTH CAUSE OF ACTION
(Statutory Liability)

37. Defendants are liable to Plaintiffs under the statutory laws and regulations of the Republic of Colombia and/or the United States of America.

EIGHTH CAUSE OF ACTION
(Violation of Statutes as Negligence)

38. Defendants' violation of statutory laws and regulations of the Republic of Colombia and/or the United States of America makes them negligent as a matter of law, and liable to Plaintiffs for their damages.

NINTH CAUSE OF ACTION
(Res Judicata, Collateral Estoppel, and Comity)

39. Under the authority of the laws of the Republic of Colombia, the Ministry of Agriculture, Instituto Nacional de los Recursos Naturales Renovables y del Ambiente (INDERENA), the Colombian environmental agency, undertook a complete investigation of the circumstances of this case. After a complete inquiry, in which Defendants had a fair opportunity to be heard and to defend, and which comported with all concepts of due process of law, as recognized in the Republic of Colombia, the United States of America, the State of Texas, or any other civilized place, INDERENA found Defendant DOW QUIMICA de COLOMBIA guilty of violating various Colombian environmental laws, found DOW QUIMICA de COLOMBIA responsible for the spill, and imposed the maximum penalty authorized by Colombian law. A copy of INDERENA's final judgment is attached hereto as Exhibit "A", and a fair and accurate translation into the English language is attached hereto as Exhibit "B". Defendant DOW QUIMICA de COLOMBIA exercised its right under Colombian law to appeal the judgment, and on June 12, 1990, the judgment was affirmed. A fair and accurate copy of the order affirming the judgment is attached hereto as Exhibit "C", and a fair and accurate translation into the English language is attached hereto as Exhibit "D". Under principles of res judicata, collateral estoppel, and comity, the judgment is binding upon this Honorable Court, and fixes Defendants' liability to Plaintiffs as a matter of law.

TENTH CAUSE OF ACTION
(Other)

40. Plaintiffs reserve the right to amend this Petition.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that upon final hearing hereof, they have and recover judgment against Defendants, DOW QUIMICA de COLOMBIA, S.A. and DOW CHEMICAL COMPANY, jointly and severally, for:

1. Plaintiffs' actual damages.

2. Plaintiffs' costs and reasonable attorney fees herein; and

3. Such other and further relief, general and special, legal or equitable, as this Honorable Court deems just and right.

Dated this 21 day of December, 1990.

Respectfully Submitted,

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiffs,

v.

DOW QUIMICA DE COLOMBIA, S.A., AND DOW CHEMICAL COMPANY,

Defendants.

CIVIL ACTION H-91-0438

NOTICE OF REMOVAL

In accordance with 28 U.S.C. § 1441, Defendant, Dow Chemical Company ("Dow") files this its Notice of Removal with this Court for removal of this action from the 165th Judicial District Court of Harris County, Texas, and states in support thereof:

1. Plaintiffs and Defendant, Dow Chemical, are of diverse citizenship and the matter in controversy exceeds $50,000 exclusive of interest and costs. This Notice of Removal is being filed within thirty (30) days of service of Plaintiffs' Original Petition. All requirements of 28 U.S.C. § 1441 and 1446 are met and this case should be removed.

2. Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (ANPAC), *et al.* commenced this action on December 21, 1990 as Civil Action No. 90-066186, In the District Court of Harris County, Texas, 190th Judicial District. Dow was served with the Original Petition on January 25, 1991. Certified copies of all process, pleadings, and orders served

on Dow in the State Court action are being filed contemporaneously with the filing of this Notice of Removal. In addition, copies of the Notice, the State Court docket sheet, any order signed by the State Judge, a completed civil cover sheet, an index of matters being filed, and a list of all attorneys including their addresses, their telephone numbers, and whom they represent are being provided pursuant to Order of this Court.

3. On or about December 31, 1990, ANPAC, et al., as Plaintiffs, filed their Original Petition seeking to recover economic damages and damages for personal injury and property destruction occasioned as a result of an alleged escape of a pesticide from a storage facility located near Cartagena, Colombia. ANPAC, et al. claim that their damages exceed $50,000.

4. Plaintiffs, ANPAC, et al., are residents of the Republic of Colombia. Defendant, Dow Chemical, is a resident of the state of Michigan. Dow was incorporated in the State of Michigan and maintains its principal place of business at Midland, Michigan.

5. Defendant Dow Quimica de Colombia S.A. ("Dow Quimica"), is a corporation incorporated under the laws of the Republic of Colombia with a principal place of business in Bogota, Colombia. Dow Quimica has been fraudulently joined to destory diversity jurisdiction. Dow Quimica does no business in Texas, has no contacts with Texas, and distributes no products in Texas. Dow Quimica has no employees or representatives in Texas. Dow Quimica has committed no tort in the State of Texas. The courts of the State of Texas cannot assert personal jurisdiction or long arm jurisdiction over Dow Quimica. Accordingly, Dow Quimica is fraudulently joined because no possibility exists that Plaintiffs can assert a viable cause of action against Dow Quimica in Texas Courts.

6. The amount in controversy in this case exceeds $50,000. This controversy between Dow Chemical, Defendant, and Plaintiffs is a dispute between a citizen of a state and citizens or subjects of a foreign state. As such, Dow requests removal of this

case to this Court which is the United States District Court in which the original action could have been brought, 28 U.S.C. § 1441(a).

7. This Court has removal jurisdiction over this action pursuant to 28 U.S.C. § 1441(a) and (b). Dow has timely filed this Notice of Removal with the Court within thirty (30) days of January 25, 1991, the date on which Dow was served with citation and the Original Petition in this matter.

8. Concurrently with the filing of this Notice of Removal, Dow has served notice of this removal on all parties of record and on the clerk of the 165th Judicial District Court for Harris County, Texas. 28 U.S.C. § 1446(d).

9. Concurrently with the filing of this Notice of Removal, Dow, on information and belief, alleges that Dow Quimica has filed a Motion to Dismiss the fraudulently joined Dow Quimica de Colombia, S.A., has filed a Motion to Dismiss on the basis of *forum non conveniens* on behalf of Dow Chemical, and a Motion to Limit Discovery pending the resolution of the Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Dow Chemical Company prays for removal of this action from the 165th Judicial District Court of Harris County, Texas, to this court, and for such other and further relief to which Dow Chemical Company may show itself justly entitled.

DATED: February 15, 1991.

Respectfully submitted,

By: RICHARD O. FAULK

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 1991, a true and correct copy of the above and foregoing Notice of Removal was mailed, certified mail, return receipt requested, to:

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RICHARD O. FAULK
Richard O. Faulk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiffs,

vs.

DOW QUIMICA DE COLOMBIA, S.A., AND DOW CHEMICAL COMPANY,

Defendants.

CIVIL ACTION H-91-0438

PLAINTIFFS' MOTION TO REMAND
[EXCERPTS ONLY]

Come now plaintiffs in the above-entitled action and move this Court pursuant to 28 U.S.C. 1447(c) to remand the case to the District Court, Harris County, Texas, 190th Judicial District, Civil Action No. 90-066186.

This motion is supported by the memorandum of law filed and affidavits of Richard P. Clem and German Sarmiento Palacio, all of which are filed herewith.

This motion to remand is based upon the ground that the federal court lacks subject matter jurisdiction.

Dated this 14 day of March, 1991.

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Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

I hereby certify that I have discussed the foregoing Motion with opposing counsel in an attempt to resolve this matter without the necessity of Court action, but counsel for Plaintiff was opposed to this Motion.

DAVID T. ALTENBERN
David T. Altenbern

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Plaintiff's Motion To Remand" and all supporting documents filed therewith were served upon Richard O. Faulk, Akin, Gump, Strauss, Hauer & Feld, 1900 Pennzoil Place — South Tower, 711 Louisiana, Houston, Texas 77002 by certified mail, return receipt requested, on this the 14 day of March, 1991.

DAVID T. ALTENBERN
David T. Altenbern

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiffs,

vs

DOW QUIMICA DE COLOMBIA, S.A., AND DOW CHEMICAL COMPANY,

Defendants.

CIVIL ACTION H-91-0438

DECLARATION UNDER PENALTY OF PERJURY OF GERMAN SARMIENTO PALACIO

German Sarmiento Palacio declares under penalty of perjury under the laws of the United States of America as follows:

1. I am the Colombian attorney for the plaintiffs in the above-entitled action.

2. My office address is Calle 71, No. 5-83, Bogota, Colombia.

3. I have been licensed to practice law in Colombia since 1968. I studied law at and earned the degree of Doctor in Jurisprudence from the Colegio Mayor del Rosario. I also studied comparative law at the New York University Law School in 1969 and 1970. I have served as member and director of the Legal Department of Citibank, N.A. Since 1971, I have been Senior Partner of the law firm SARMIENTO PALACIO & MICHELSEN in Bogota. I was deputy mayor of Bogota in 1982 and 1983.

4. I am founder and President of the Foundation for the Defense of the Public Interest ("FUNDEPUBLICO"), a non-

profit private organization founded in 1988. The purpose of the foundation is the judicial defense of the interest of society, the public, and groups of individuals affected by collective phenomena caused by the action or omission of the State or of private persons.

5. I am the author of *Las Acciones Populares en el Derecho Privado Colombiano* (Popular Actions in Colombian Private Law), a treatise on Colombian class-action jurisprudence.

6. Each of the individual plaintiffs in this action is a small-scale commercial fisherman who derive a living from the waters of the Bay of Cartagena, Colombia.

7. As a result of the June 19, 1989, chemical spill which is the subject of this lawsuit, each individual plaintiff suffered personal injuries, property damage, and/or loss of income.

8. While each individual fisherman suffered a loss of livelihood, annual wages in Colombia are lower than in the United States.

9. No individual fisherman suffered a loss greater than fifty thousand U.S. dollars ($50,000.00).

10. Plaintiff ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA ("ANPAC") (National Association of Small-Scale or Craft-Scale Fishermen of Colombia) is an association incorporated under Colombian law for the purpose of promoting the personal well being and business interests of its members, all of whom are small-scale commercial fishermen in Colombia. All individual fishermen plaintiffs in this action are members of ANPAC.

11. After the subject chemical spill, each of the individual plaintiffs executed a power of attorney, a representative copy of which is attached hereto as exhibit A. A fair and accurate translation is attached as exhibit B.

12. These powers of attorney give ANPAC the power to pursue the individual fishermen's claims in the courts.

13. Under Colombian law, ANPAC (together with its attorneys) serves only as the collection agent for the individual plaintiffs. Any proceeds received thereunder are held for the benefit of the individual plaintiffs.

14. ANPAC paid no consideration for any of the powers of attorney.

15. In the instant case, ANPAC is pursuing no claim on its own behalf. Its only claim in this action arises out of the powers of attorney.

16. I have read the opinion of the United States Supreme Court in the case *Woodside v. Beckham*, 216 U.S. 117 (1910). The powers of attorney in the instant case are, under Colombian law, virtually identical to those described in the *Woodside* case.

17. Because it holds several hundred of these powers of attorney, ANPAC's total claim is for significantly more than fifty thousand U.S. dollars ($50,000.00). But each individual fisherman's claim is for less than fifty thousand U.S. dollars ($50,000.00).

18. By making this declaration, I realize that even after the case is remanded to the Texas courts, each individual fisherman will be precluded from claiming more than fifty thousand U.S. dollars ($50,000.00) in damages. I am authorized by the powers of attorney to make this stipulation on behalf of my fisherman clients.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on March 8th, 1991 at Bogota, Colomia.

GERMAN SARMIENTO PALACIO

German Sarmiento Palacio

* * *

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiffs,

vs

DOW QUIMICA DE COLOMBIA, S.A.,
AND
DOW CHEMICAL COMPANY,

Defendants.

Civil Action No. H-91-0438

STATE OF MINNESOTA }
COUNTY OF HENNEPIN } SS.

AFFIDAVIT OF RICHARD P. CLEM

Richard P. Clem, being duly sworn, deposes and states as follows:

1. I am one of the attorneys for the plaintiff fishermen in this action. My office address is 1313 Southeast Fifth Street, Suite 127, Minneapolis, MN 55414.

2. I have read the affidavit of German Sarmiento Palacio, and attest to the truth of all matters asserted therein.

3. Specifically, no individual fisherman in this case claims more than $50,000.00 in damages. Plaintiff ANPAC's sole claim in this action arises out of the powers of attorney described in Mr. Sarmiento's affidavit. Because ANPAC holds several hundred of these powers of attorney, ANPAC's aggregate claim is for

more than $50,000.00. But each individual claim is for less than $50,000.00

4. As attorney for ANPAC and the fishermen, I am authorized to stipulate, and I do stipulate, that no individual fisherman claims more than $50,000.00 in damages. I realize that this stipulation will be binding upon my clients even after the case is remanded back to the Texas state courts.

5. As part of my initial research for this case, I have attempted to ascertain what jurisdictional contacts defendant DOW QUIMICA de COLOMBIA might have with the State of Texas.

6. I am aware that Dow Chemical Company has a large chemical plant in the State of Texas. While no discovery has yet been done on jurisdictional issues, I believe that it is likely that some of the chemicals involved in the subject chemical spill might have been produced by that plant.

7. The instant case involves the chemical chlorpyrifos, which is sold under the Dow trade names LORSBAN and DURSBAN. I have reviewed certain files submitted by Dow Quimica de Colombia and/or Dow Chemical Company to the Colombian Ministry of Health, Toxicological Section, with regard to the licensing of chlorpyrifos in Colombia.

8. Those documents from the Colombian Ministry of Health indicate that Dow Quimica de Colombia relied upon Dow's Texas facilities to document the license application.

9. Exhibit A to this affidavit is a true and accurate copy of certain documents from the files of the Colombian Ministry of Health. Those documents indicate that Dow Quimica de Colombia relied upon at least (5) Dow technical documents produced in Texas in order to have Chlorpyrifos licensed in Colombia.

10. Most of the documents submitted to the Colombian Ministry of Health were in the English language, and were clearly written somewhere in the United States. Some of the documents

appear to have come from Midland, Michigan, but other documents have no indication of their state of origin. Because of Dow's presence in Texas, it would seem likely that some of the other documents relied upon to license Chlorpyrifos in Colombia also originated in Texas.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By: RICHARD P. CLEM
Richard P. Clem

Subscribed and sworn to before
me this 11th day of March, 1991.

DIANNE C. TAYLOR
Notary Public

[SEAL]

Dianne C. Taylor
Notary Public — Minnesota
Washington County
My Commission Expires 09-14-95

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA (ANPAC), *et al.*,

Plaintiff.

v.

DOW QUIMICA DE COLOMBIA, S.A., AND DOW CHEMICAL COMPANY,

Defendant.

CIVIL ACTION H-91-0438

DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND DECLARATION SUBMITTED IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND

COME NOW Dow Quimica de Colombia, S.A. ("Dow Quimica") and Dow Chemical Company ("Dow Chemical"), Defendants herein, and file this Motion to Strike Affidavit and Declaration Submitted in Support of Plaintiffs' Motion to Remand, respectfully showing the following:

OBJECTIONS

1. Plaintiffs have submitted the sworn declaration of German Sarmiento Palacio and the affidavit of Richard P. Clem to support

their motion to remand. Defendants object to the declaration and affidavit because:

> (A) They fail to state that they are based on the declarant's and affiant's personal knowledge and, on their face, demonstrate that they are based upon inadmissible hearsay.
>
> (B) They attach and rely upon documents which are not properly authenticated or established for use as evidence under the Federal Rules of Civil Procedure and Evidence.
>
> (C) On their face, they are based upon speculation and surmise regarding the alleged relationships between the two Defendants in this action, the locations at which products were manufactured, the use of the attached documents in licensing products in Colombia, and the extent of damages, if any, suffered by Plaintiffs.

STRIKING THE STATEMENTS

2. Clearly, a district court may, on its own motion and without abuse of discretion, properly refuse to credit an affidavit which is defective on its face, especially if the affidavit is not made on the personal knowledge of the affiant. *CMS Industries, Inc. v. L. P. S. International, Ltd.*, 643 F.2d 289, 295 (5th Cir. 1981). In the present case, the declarant and affiant clearly lack personal knowledge of the matters discussed in their sworn statements. Moreover, the statements disclose that they are based upon unverified foreign documents and are filled with rank speculations about the critical issues affecting Plaintiffs' motion to remand. Accordingly, they should be stricken and not considered by the Court for any purposes.

WHEREFORE, PREMISES CONSIDERED, Defendants Dow Quimica de Colombia, S.A. and Dow Chemical Company respectfully pray that the declaration and affidavit submitted in support of Plaintiffs' Motion to Remand be stricken.

Respectfully submitted,

AKIN, GUMP, STRAUSS,
HAUER & FELD

By: RICHARD O. FAULK

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 1991, a true and correct copy of the above and foregoing Motion to Defer was forwarded by certified mail, return receipt requested to parties of record or their counsel of record as follows:

David T. Altenbern CM/RRR P 347 816 018
Robertson, Altenberg & Nielsen, P.C.
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Of Counsel:

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Anchorage, Alaska 99501

German Sarmiento Palacio
Fundacion Para La Defensa
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Bogota, Republic of Colombia

RICHARD O. FAULK

Richard O. Faulk

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-592

THE DOW CHEMICAL COMPANY,

Petitioner,

-vs-

ASOCIACION NACIONAL DE PESCADORES
A PEQUENA ESCALA O ARTESANALES DE COLOMBIA,
et al.,

Respondents.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

Respondents' Brief in Opposition To Petition for Writ of Certiorari

---

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David Altenbern
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German Sarmiento Palacio
Bogota, Colombia
Of Counsel

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Defendants removed this case to the U.S. District Court, alleging Diversity of Citizenship and an Amount in Controversy in excess of $50,000. Plaintiffs moved to remand. Was remand proper when, in the words of the Court of Appeals:

> (1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above $50,000;
>
> (2) the defendants offered only a conclusory statement in their notice of removal that was not based on direct knowledge about the plaintiff's claims; and
>
> (3) the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.

988 F.2d at 566.

2. The plaintiffs are seven hundred fishermen, each suing for his or her personal injuries and/or economic loss. Can the claims of the individual fishermen be

aggregated to achieve the requisite Amount in Controversy?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-592

THE DOW CHEMICAL COMPANY,

Petitioner,

-vs-

ASOCIACION NACIONAL DE PESCADORES A PEQUENA ESCALA O ARTESANALES DE COLOMBIA, et al.,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

---

Respondents' Brief in Opposition To Petition for Writ of Certiorari

---

Respondents respectfully submit this brief in opposition to Respondent Dow Chemical Company's Petition for a Writ of Certiorari.

OPINIONS BELOW

The Petition seeks review of a

published opinion of the Fifth Circuit, Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559 (1993). This opinion, as well as the District Court's Order of Dismissal, are printed in Petitioner's Appendix.

JURISDICTION

This Court's jurisdiction was properly invoked, pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

This case involves the Amount in Controversy provisions of the Diversity statute, 28 U.S.C. 1332, which is printed in Petitioner's Appendix.

STATEMENT OF THE CASE

This is an action for personal injuries and prospective pecuniary loss arising out of the June 19, 1989, pesticide spill into the Bay of Cartagena, Colombia. Plaintiffs are approximately 700 small-scale fishermen injured by the spill. Plaintiffs originally

filed the action in the state District Court, Harris County, Texas, on December 21, 1990. (R. 168-83, Pet. Apdx. 27a - 42a).[1] The defendants were Dow Quimica de Colombia, a Colombian corporation, the owner of the plant, and Dow Chemical Company, an American Corporation. The American Corporation is sometimes referred to in this brief as Dow Chemical Company (U.S.A.).

On February 15, 1991, the Defendants removed the case to the United States District Court for the Southern District of Texas. (R. 157, Pet.Apdx. 43a). Dow Quimica de Colombia then moved to dismiss for lack of personal jurisdiction. (R. 150). Dow Chemical Company (U.S.A.) moved to dismiss for Forum Non Conveniens (R.130).

---

[1]. Citations to the Record on Appeal prepared by the Clerk of District Court are abbreviated R. ___. Citations to the Transcript of Hearing of April 15, 1991, are abbreviated T. ___. Citations to Petitioner's Appendix are abbreviated Pet.Apdx. ___.

On March 15, 1991, plaintiffs moved to remand the case to state court due to lack of subject-matter jurisdiction. (R. 107). Plaintiffs argued that neither Amount in Controversy nor Complete Diversity requirements had been met.

On April 15, 1991, the District Court, the Honorable Lynn N. Hughes, presiding, heard and considered all pending motions. (R. 5, 78). On April 16, 1991, the District Court dismissed the action in an order:

1. Denying plaintiffs' motion to remand;

2. Dismissing the case against Dow Quimica de Colombia for lack of personal jurisdiction;

3. Dismissing the entire case for forum non conveniens. (R. 4, Pet. Apdx. 24a).

From that Order of Dismissal, plaintiffs appealed on May 13, 1991. (R. 1, Pet.Apdx. 24a), to the United States Court

of Appeals for the Fifth Circuit. On April 15, 1993, the Court of Appeals, Garza, Garwood, and Duhe, JJ., affirmed the dismissal of the case against defendant Dow Quimica de Colombia, S.A. It vacated the judgement of the District Court with respect to Dow Chemical (USA), and ordered the case remanded to State Court. Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559 (1993). Rehearing was denied on September 8, 1993.

STATEMENT OF FACTS

This personal injury and economic damage case arises out of the June 19, 1989, pesticide spill into the Bay of Cartagena, Colombia. The action was originally filed in Texas state court, and removed by defendants. The plaintiffs are small-scale commercial fishermen who were injured by that spill. (R. 173). Plaintiffs allege that because of the spill, they suffered

personal injuries (R. 179) and economic losses (R. 178).

One of the plaintiffs in this action is "ANPAC" (Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia/ Colombian Association of Small-Scale or Craft-Scale Fishermen). ANPAC is pursuing no claim on its own behalf in the instant case. (Affidavit of Dr. German Sarmiento Palacio, R. 91, Pet.Apdx. 53a). Instead, ANPAC is simply acting as a collection agent for its individual members. Id. Any proceeds ANPAC receives from the instant case are held for the benefit of is individual members. Id.

In order to prosecute this case in the courts, each individual plaintiff executed a power of attorney to ANPAC. (Original Petition, R. 174, Pet.Apdx. 34a). Each of these powers of attorney is, except for the names, identical. A representative copy is found at pages 93 and 94 of the Record. The

translation into English is found at page 95 of the Record.

Each power of attorney provides in part:

> The person who signs the present document grants Special Power of Attorney, but ample and sufficient to . . .ANPAC in order that, in our name bring legal action against the DOW CHEMICAL OF COLOMBIA, S.A., or any Company linked, originated in the spill of the product: LORSBAN 4-E-PESTICIDE, coming from the reservoirs of the named company, which happened on June 19th, 1989.

(R. 95).

ANPAC paid no consideration for any of the powers of attorney. (R. 91). ANPAC is pursuing no claim on its own behalf. Its only claim in this action arises out of the powers of attorney. Id.

By North American standards, Colombia is a poor country. While the fishermen-plaintiffs eked out a living from the now-polluted waters, it is also true that their annual wages were never great. Thus, it is

abundantly clear that no individual fisherman suffered a loss greater than $50,000.00 (R. 90).

Because it holds several hundred powers of attorney, ANPAC's total claim in the instant case is for more than $50,000.00. But each individual fisherman's claim is for less than $50,000.00 It is only by aggregating these many small claims that the total demand exceeds $50,000.00 (R. 91)

Counsel for plaintiffs offered affidavits in support of the proposition that each individual fisherman's damages were less than $50,000.00 They also acknowledged each individual fisherman will be precluded from claiming more than $50,000.00, even after the case is remanded to the State courts. (R. 85, 92; Pet.Apdx. 53a, 56a). The above-referenced powers of attorney authorize counsel to make this stipulation. Id.

The affidavit of Dr. German Sarmiento

Palacio, plaintiffs' Colombian attorney, stated as follows:

> 6. Each of the individual plaintiffs in this action is a small-scale commercial fisherman who derive a living from the waters of the Bay of Cartagena, Colombia.
>
> 7. As a result of the June 19, 1989, chemical spill which is the subject of this lawsuit, each individual plaintiff suffered personal injuries, property damage, and/or loss of income.
>
> 8. While each individual fisherman suffered a loss of livelihood, annual wages in Colombia are lower than in the United States.
>
> 9. No individual fisherman suffered a loss greater than fifty thousand U.S. dollars ($50,000.00).

(R. 90 ; Pet. Apdx. 52a).

Defendants asserted at paragraph 3 of their notice of removal (R. 158, Pet.Apdx. 44a), that "ANPAC, et al. claim that their damages exceed $50,000.00" However, Plaintiffs' original state-court pleading says no such thing. Again, only the

aggregate claim exceeds $50,000.00.

The action was removed to the Federal Court on February 15, 1991. In removing, the defendants alleged diversity of citizenship. The defendants acknowledged, however, that on the face of the Petition there was not complete diversity because there were aliens (Colombians) on both sides. Defendants alleged that defendant Dow Quimica de Colombia, a Colombian corporation, was fraudulently joined as a defendant to defeat diversity.

REASONS FOR DENYING THE WRIT

Under Rule 10 of this Court's Rules, Certiorari is generally appropriate to review conflicts between the circuits, or cases where a lower Court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," or cases involving "an important question of federal law which has not been, but should be, settled by this Court. . . ."

None of these reasons for discretionary review has been cited or implicated by the Petition. Petitioner cites no conflict between the circuits. The case certainly does not call into question the supervisory jurisdiction of this Court. And because the issues decided by the Court of Appeals were exceedingly narrow in scope, the case does not involve an "important" federal question

as contemplated by the rule.

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE "AMOUNT IN CONTROVERSY" WAS LESS THAN FIFTY THOUSAND DOLLARS.

It should first be noted that there is apparently no conflict between the circuits on this issue, and the Petition cites none.

It should also be noted that the issue in the instant case is exceedingly narrow. The Court of Appeals correctly framed the issue as whether remand was proper under the following limited circumstances:

> (1) the complaint did not specify an amount of damages, and it was not otherwise facially apparent that the damages sought or incurred were likely above $50,000;
>
> (2) the defendants offered only a conclusory statement in their notice of removal that was not based on direct knowledge about the plaintiff's claims; and
>
> (3) the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present.

988 F.2d at 566.

The Court of Appeals correctly held that, in these circumstances, remand was proper.

The gist of Petitioner's argument (Petition for Writ of Certiorari, pp. 5-12) is that each individual plaintiff's "amount in controversy" was above the jurisdictional limit. It should first be noted that defendants did not even make this argument in the District Court. While the motion for remand was pending, defendants argued only that the individual claims should be aggregated. (R. 68-73). Defendants never asserted while the motion to remand was pending that each individual plaintiffs' claim was actually for more than fifty thousand dollars. Since Petitioner raised the issue for the first time on appeal, certiorari would be improper. If this Court were to deem the issue important enough for review, it should do so in a case where the issue was properly briefed, and the record

sufficiently developed, in the District Court.

But even assuming that defendants have properly preserved this argument, it is clear that the Court of Appeals' decision was correct. The party seeking to invoke federal jurisdiction bears the burden of proof on the issue. Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252, 253-54 (5th Cir. 1961); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936):

> If [the removing party's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

Id. at 189.

In the instant case, the defendants did not establish their right to remove by competent proof. Instead, the only "evidence" was a conclusory allegation in the Notice of Removal (R. 157, Pet. Apdx.

43a). The only statement in the Notice of Removal[2] to support that allegation was false. In short, there was no "competent proof," but only conclusory allegations.

The decision below is well supported by long-standing precedents of this Court and the Courts of Appeal. In other words, certiorari is not necessary to cure any conflict between the circuits or for supervisory reasons.

For example, in Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252 (5th Cir. 1961), which was decided when the jurisdictional limit was $10,000, the plaintiffs commenced an action in Florida state court which demanded damages "in language no more specific than 'in excess of $5,000.00.'" Id. at 253.

---

[2]. The only factual allegation of the Notice of Removal was that "ANPAC, et al. claim that their damages exceed $50,000." (R. 158, RE 23). ANPAC, et al., never made any such claim.

In Gaitor, the Court held that subject matter jurisdiction was lacking due to lack of amount in controversy. In other words, it refused to double the number specified in the state-court pleading. In the instant case, the only allegation of the pleading is that total damages exceed $500.00, or that each individual plaintiff's claim exceeded the approximate sum of seventy one cents.[3] In Gaitor, the Court refused to double the amount in controversy from five thousand to ten thousand. In the instant case, plaintiffs respectfully submit that the Court should not increase it by a factor of 70,000, from seventy one cents to $50,000.

Another long-standing controlling

---

[3]. The only allegation in the State court pleading was that "[d]amages far exceed the minimum jurisdictional limits of this [i.e. the Harris County District] court." That jurisdictional limit is $500.00. Texas Constitution, Article 5, Section 8. Furthermore, under Texas law, all claims must be aggregated to achieve the $500.00 limit. Vernon's Texas Gov't Code, Section 24.009.

precedent is Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978). If Gaitor was on all fours, then Lindsey is on all fives with the instant case. Lindsey, a class action, also involved the issue of aggregation of claims. The state-court pleading asked for $1,002,000.00. Id. at 595. However, the petition nowhere alleged the number of persons in the class. Id. at 595. The Court of Appeals, citing this Court's decision in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938), held that the $10,000.00 amount in controversy was not met:

> Significantly, the complaint nowhere alleges the number of persons in the class, an allegation that would have permitted the court to ascertain what dollar amount represents the "amount in controversy" for each member of the class. . . [I]t was not open for defendants to attempt to show that the class was small enough that the claims on its behalf exceeded the sum of $10,000.00 per capita. Nor was it open to the district court to speculate that such was in fact

the case.

Id. at 595.

In the instant case, the size of the class is known to be approximately seven hundred. Arguably, the dollar amount for each plaintiff is not stated (except for the state jurisdictional allegation, which amounts to a claim of seventy one cents per plaintiff). As the Court in Lindsey was not allowed to speculate as to the size of the class, defendants in the instant case are not at liberty to speculate as to the dollar amount per plaintiff.

Contrary to Petitioner's assertion, the instant case is completely distinguishable from St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938). At the time St. Paul Mercury was decided, the amount in controversy requirement was $3,000.00. Id. at 286. The state-court pleading in St. Paul Mercury demanded the sum of $4,000.00. Id. at 285. In other words, on the face of

the complaint (unlike in the instant case), the amount in controversy requirement was met. After the case was removed to Federal Court, the plaintiff filed an amended complaint. The amended complaint still demanded the sum of $4,000.00, but also had attached to it an exhibit asserting that the claimed injuries totalled $1,380.89. Id. at 285. The case was dismissed on the merits, and the Court of Appeals held, sua sponte, that the amount in controversy requirements were not met, due to the exhibit attached to the amended complaint. Id. at 285.

This Court simply held that because $4,000.00 was claimed at the time of removal, nothing changed when the amended complaint was filed. In the passage from the opinion quoted above, it is clear that the plaintiff reduced the amount of his claim with the amended complaint. Id. at 292-93.

In the instant case, the plaintiffs

never reduced the amount of their claim. As noted above, the only allegations of the state court pleadings were that each fisherman's damages exceeded the sum of seventy one cents. The motion to remand in this case and the affidavits submitted in connection therewith were simply submitted as evidence of the actual amount in controversy, as it existed at the time of removal.

The Court of Appeals' decision is also consistent with the policy of respecting federalism and legitimate concern for the integrity of State courts. This Court has held that the removal statutes should be construed narrowly:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states

> under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." Healy v. Ratta, 292 U.S. 263, 270; see Kline v. Burke Construction Co., 260 U.S. 226, 233, 234; Matthews v. Rodgers, 284 U.S. 521, 525; cf. Elgin v. Marshall, 106 U.S. 578.

Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 108-09 (1941). As noted above, the Court of Appeals' holding was narrow. It was largely based upon the fact that "the plaintiffs timely contested removal with a sworn, unrebutted affidavit indicating that the requisite amount in controversy was not present." 988 F.2d at 566.

To get around the narrowness of this holding, Petitioner argues that the sworn, unrebutted affidavits should not have been considered by the Court. Petition for Writ

of Certiorari at pp. 7-8. This issue, the admissibility of certain affidavits, was not decided contrary to any other prior ruling of this Court, nor of any other Court of Appeal. And this issue of admissibility affects only the instant case; it is not a question of general importance as to invoke the discretionary jurisdiction of this Court. In other words, it is a mere evidentiary ruling, hardly appropriate for review by Certiorari.

And it is also clear that the Court of Appeals acted properly in considering these affidavits. First of all, this evidentiary issue was decided in the first instance by the District Court: "The motion to strike the affidavits on the motion to remand is denied. I read them." (T. 42). The defendants have not shown in any way that the District Court abused its discretion on this evidentiary ruling. Indeed, since defendants never filed any cross appeal, the

issue is not even properly before the Court.

The gist of defendants' admissibility argument is that these affidavits should have been excluded because they did not include the magic words "personal knowledge." There has never been any requirement that an affidavit must recite these words. It is clear, however, from the face of these affidavits that the affiants had personal knowledge of the facts of the case.

The admissibility of certain affidavits is not the type of issue which the Court should consider on certiorari. This is especially true where, as here, the issue was correctly decided both by the District Court and the Court of Appeals.

The defendants had the burden of proof on this issue, an issue they chose not to address in the District Court. They failed to establish federal jurisdiction, and the Court of Appeals properly found that

jurisdiction was lacking. Accordingly, Respondents respectfully submit that certiorari is inappropriate on this issue.

II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE INDIVIDUAL PLAINTIFFS' CLAIMS COULD NOT BE AGGREGATED.

Petitioner next argues that the Court of Appeals erred in not aggregating the personal injury and economic loss claims of the individual plaintiffs. This argument is clearly contrary to the well-settled precedents of this Court. (This was the only argument advanced by Petitioner in the District Court in support of its position that the "amount in controversy" requirement was met.)

In the instant case, each individual plaintiff demands less than $50,000.00. It is true that plaintiffs' collection agent, ANPAC, has a total aggregated claim in excess of that amount. But it has been universally held that the amount in

controversy cannot be established by aggregating many small claims. Each individual claim must be judged on its own merits. The District Court cannot add up the small claims in order to determine the amount in controversy.

This rule was announced by this court in Waite v. Santa Cruz, 184 U.S. 302, 328-29 (1902):

> We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgement upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

In the instant case , too, the individual fishermen are the "real owner" of their claims. ANPAC holds the claims for collection only.

Plaintiffs' Colombian attorney, who has studied law both in the United States and Colombia (R. 89, Pet.Apdx. 51a), testified by way of affidavit (R. 91, Pet.Apdx. 53a) that the powers of attorney in the instant case are, under Colombian law, virtually identical to the assignments described this court in Woodside v. Beckham, 216 U.S. 117, 119 (1910):

> [T]he claims other than [those of the named plaintiff] were assigned to plaintiff for the purpose of collection only; . . . he paid no consideration therefor, and . . . if plaintiff recovered upon the claims from defendants the amount of such recovery above the plaintiff's individual claim would be for the benefit of the several assignors thereof and would be distributed to them in proportion to the amount of the claim of each.

Thus, in the instant case, as in Woodside, the individual fishermen's claims cannot be aggregated in an attempt to reach the jurisdictional limits. Each claim must stand alone.

The rule of no aggregation of claims was applied in an environmental tort case similar to the instant in Zahn v. International Paper Co., 414 U.S. 293 (1973). In that case, the plaintiffs "sought damages from International Paper Co., a New York corporation, for allegedly having permitted discharges from its pulp and paper-making plant, located in New York, to flow into Ticonderoga Creek and to be carried by that stream into Lake Champlain, thereby polluting the waters of the lake and damaging the value and utility of the surrounding properties." Id. at 192.

The instant case is nearly identical; only a few names need be changed: Plaintiffs sought damages from Dow Chemical Company and Dow Quimica de Colombia, U.S. and Colombian corporations, for allegedly having permitted discharges from its chemical-making plant, located in Mamonal, Colombia, to flow into a creek and to be

carried by that stream into the Bay of Cartagena, thereby polluting the waters of the bay and damaging the value and utility of the surrounding fisheries.

This Court did not allow aggregation of claims in International Paper; it should not be allowed in the instant case.

Petitioner Claims that the plaintiffs were suing to enforce "integrated" or "undivided" rights. (Petition at p. 12). Petitioner cites the "classic statement of this exception," Pinel v. Pinel, 240 U.S. 594 (1916). Pinel is completely distinguishable. In Pinel, two family members ere suing together to recover undivided shares of a single piece of real property.

The instant case is not a fish wrongful death case. If it were, if the plaintiffs were actually suing in their capacity as the executors of the estate, as petitioner put it, of "100 sea bass" (R. 73), there might

be some merit to petitioner's argument.

But the instant case is one for personal injuries and economic loss. One of the leading environmental tort cases involving fishermen is Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). In that case, the plaintiffs, like the plaintiffs in the instant case, were fishermen whose livelihood was destroyed by a spill. The court made clear that the action was one for "prospective pecuniary damage." Id. at 563. The court's ultimate holding was that "Neither [plaintiff nor defendant] should be permitted negligently to inflict commercial injury on the other." Id. at 570-71.

In the instant case, each individual fisherman has suffered his own "prospective pecuniary damage" and "commercial injury." One fisherman cannot collect for another fisherman's loss of business. Each stands alone, and the claims cannot be aggregated.

Plaintiffs are not suing for "damages for 100 sea bass killed by the spill," as defendants argued below (R. 73). Instead, plaintiffs are suing for the thousands of pesos each one lost because of the spill. The dead fish are only the means by which defendants inflicted the loss of business.

It should also be stressed that the instant case involves personal injuries caused to some of the plaintiffs. (R. 178, 179; Pet.Apdx. 382). It is difficult to see how the fishermen can collectively have an undivided interest in each other's skin rashes and other personal injuries.

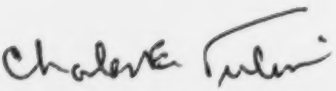
Since Petitioner's argument in this regard runs so afoul of well-settled precedent of this Court, Certiorari is not appropriate on this issue.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

December 8, 1993.

Respectfully Submitted,



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